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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
Courts of Exchequer & Exchequer Chamber,
FROM
TRINITY VACATION, 3 VICT.
TO
HILARY VACATION, 4 VICT., BOTH INCLUSIVE;
WITH
TABLES OF THE CASES AND PRINCIPAL MATTERS.

BY
R. MEESON, Esq., AND W. N. WELSBY, Esq.,
OF THE MIDDLE TEMPLE, BARRISTERS AT LAW.

VOL. VII.

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OF THE
COURT OF EXCHEQUER,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Honourable JAMES, Lord ABINGER,
Chief Baron.

BARONS.

The Right Honourable Sir JAMES PARKE, Knt.
Sir EDWARD HALL ALDERSON, Knt.
Sir JOHN GURNEY, Knt.
Sir ROBERT MOUNSEY ROLFE, Knt.

ATTORNEY-GENERAL.

Sir JOHN CAMPBELL, Knt.

SOLICITOR-GENERAL.

Sir THOMAS WILDE, Knt.

ERRATA.

Page 236, lines 21 and 30, for *Manfield*, C. J., read *Macdonald*, C. B.

— note (a), for 4 B. & Adol. read 5 B. & Adol.

394, last line, for *is*, read *was*.

500, line 8 from bottom, for the question *is*, read *it is a question*.

A

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REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Exchequer

AND

Exchequer Chamber.

VACATION SITTINGS AFTER TRINITY TERM, 3 VICTORIAÆ.

DOE on the several Demises of JOHN RICHARD DUNNING,
THOMAS FERNÉE, and THOMAS TOWNSEND, v. The Right
Honourable JAMES EDWARD BARON CRANSTOUN.

1840.

THIS was an action of ejectment, to recover possession of certain lands respectively situate in the several parishes of Meavy, Walkhampton, and Buckland Monachorum, in the county of Devon. The defendant suffered judgment by default as to the portion of the said lands which were situate in the parish of Meavy, and of which Richard Barré Baron Ashburton, at the time of making his will, and at the time of his death as hereinafter mentioned, was seised in fee, and as to the residue of the lands in the declaration

A testator by his will devised as follows:—
“Whereas it appears to me, that one part of my said freehold lands, viz. those lands which I hold in the parishes of W., B., and M., were held for a considerable period of time by my father’s ancestors in the

male line, bearing the name and arms of D., as hereditary proprietors of the same, I therefore consider it just and equitable that those lands should continue to be held, if possible, by persons of the same name and family. I therefore give, bequeath, and devise, the freehold lands which I hold in the three parishes aforesaid, to” &c. The property which the testator possessed in the parish of M. was freehold, but that in the parishes of W. and B. was all leasehold, which he had derived from his father’s ancestors in the male line:—*Held*, that the leasehold lands in the parishes of W. and B. were sufficiently ascertained by the will, and therefore, though incorrectly described as “freehold,” passed under the devise.

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FRANSTOUN.

mentioned, which were respectively situate in the several parishes of Walkhampton and Buckland Monachorum, the defendant pleaded not guilty, on which plea issue was joined. The latter lands were all leasehold, held by the said Lord Ashburton at the times aforesaid, for the residue of the term of 1000 years, as hereinafter mentioned. The cause came on to be tried before *Coleridge, J.*, at the last Summer Assizes for the county of Devon, when a verdict was found for the defendant, subject to the opinion of this Court upon the following case.

On or about the 21st of January, 1820, Richard Barré Baron Ashburton made his last will and testament in writing, duly executed and attested for passing real and personal property, which said will contains, amongst other things, the following devises and bequests:—"I give, bequeath, and devise all my freehold lands, manors, estates, and real property whatever, situated in the county of Devon, to my wife, the Right Hon. Anne Selby Lady Ashburton, to hold and enjoy the same for the term of her life: and whereas it appears to me, that one part of my said freehold lands, namely, those which I hold in the parishes of Walkhampton, of Buckland Monachorum, and of Meavy, were held for a considerable period of time by my father's ancestors in the male line, bearing the name and arms of Dunning, as hereditary proprietors of the same; I therefore consider it just and equitable that those lands should continue to be held, if possible, by persons of the same name and family; and although I have no son nor brother, nor other heir male known to myself, yet whereas it is possible that some distant heir male may exist, although unknown at present to me; I therefore give, bequeath, and devise, the freehold lands which I hold in the three parishes aforesaid, to that person who may, at the moment of my wife's death, in case of her surviving me, or at the moment of my own death in case

of my surviving my wife, to my nearest collateral heir male of the name of Dunning, to hold the same to him and the heirs male of his body for ever, whom failing, to his collateral heirs male for ever; and to prevent all mistakes, I declare that by the phrase 'collateral heir male,' I intend to denote a person whose consanguinity with myself can be traced altogether through males alone, without counting his pedigree in any case through a female; and I declare it to be my wish that, as soon as conveniently may be after my death, an advertisement may be three times inserted in two of the principal London newspapers, and may also be three times inserted in some newspaper published in the city of Exeter, for the purpose of calling on all persons bearing the name of Dunning, who may consider themselves entitled to benefit by this devise, to appear for their interest and produce their respective claims. And if no person can produce a valid claim within three years after the insertion of the said advertisement in the newspapers, in that case I hereby revoke this special devise of the lands situated in the aforesaid three parishes, and declare that the said lands shall be deemed to be included in the general devise of my lands situated in the county of Devon, which is hereinafter inserted. And whereas it appears to me, that the residue of the lands which I hold in the county of Devon was never held by any of my ancestors in the male line more remote than my father, by whom indeed the greatest part of the said lands was acquired by purchase: I therefore do not consider that any remote and unknown heir male of the name of Dunning, as such, possesses any claim upon the said residue of my lands, of such a nature as in reason, conscience, or equity, to call upon me to respect it; and I therefore strictly confine and limit what I am doing in behalf of such a remote heir male within the bounds of the parishes of Walkhampton, of Buckland Monachorum, and of Meavy aforesaid. Whereas

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by the death of my father's only sister, Mrs. Mary Dunning, I am now become, to the best of my knowledge and belief, the only existing descendant of my great grandfather in the male line, John Dunning, who died, if I am not mistaken, in the reign of Queen Anne; I therefore consider it impossible that any person should exist so nearly related to me on the side of my father, either through female or mixed consanguinity, as to possess any claim upon my property, of such a nature as to make it incumbent on me to respect it. And whereas the fortune that was brought to my father in marriage to my mother, amounting to £10,000 sterling, was much more than repaid to my mother by the sums which she received during the latter part of her life, in consequence of the additions which I made to her income when I reached the age of twenty-one years; I therefore do not consider that any persons related to me through my mother possess, merely as such, any claim upon my property which it is at all incumbent on me to respect, any further than I may voluntarily think fit so to do, of my own free choice. Considering, therefore, all these facts, and considering moreover that my title as a peer of Great Britain will become extinct at my decease, if I never have a son, I think myself fully authorized, not only in point of law, but in point of conscience and reason, to dispose of my property as I think fit in my voluntary choice to do, excepting so far as the claims of my wife, in the event of her surviving me, and the claims of a remote male heir, if any such person should exist, to the ancient and patrimonial part of my landed property, are respectively concerned, for both of which I have hereby already provided. Wherefore I give, bequeath, and devise all my freehold lands, manors, estates, and real property whatever, situate in the county of Devon, excepting only, in case of the existence of a collateral male heir, those lands which are situated in the parishes of Walkhampton,

of Buckland Monachorum, and of Meavy, from and after the death of my wife, first, to the Right Hon. James Lord Cranstoun, to hold and enjoy the same for the term of his life:—with remainders over to four other persons for life, bequeathing the ultimate reversion in fee to the survivor of them. The testator then gave and bequeathed all his leasehold manors and estates to his wife Lady Ashburton, to hold and enjoy the same until his interest in the said leasehold expired; but in case his wife died before that period, he then devised the same over.

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And the said Richard Barré Baron Ashburton did, by his said will, appoint his wife, Anne Selby Lady Ashburton, his sole executrix; and died without issue, and without having revoked or altered his said will, on or about the 22nd day of March, 1823, leaving his widow, the said Anne Selby Lady Ashburton, surviving him.

At the time of the making of the said will, and from thence to the time of his death, the said Richard Barré Baron Ashburton was in possession of the said leasehold lands included in the consent rule as aforesaid, and held the same for the residue of a certain term of 1000 years, which was created by an indenture, bearing date the 23rd day of December, 1650, made between Elize Chrymes of the one part, and Willmotte Dunning, widow, of the other part, whereby the said Elize Chrymes demised the said lands to the said Willmotte Dunning for the term of 1000 years from thence next ensuing, without impeachment of waste, yielding and paying, at the feast of St. Michael yearly during the said term, unto the said Elize Chrymes, his heirs and assigns, five shillings, if it were lawfully demanded; and also the said Willmotte Dunning, her executors and assigns, doing suit at the two law courts of the said Elize Chrymes, his heirs and assigns, twice in the year to be holden within his or their manor of Buckland Monachorum. By indenture, bearing date the 5th of

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December, 1659, the said Willmotte Dunning assigned the said term of 1000 years to her son Richard Dunning. The said Richard Dunning, by his will, dated the 12th of November, 1692, devised all his lands in Meavy to his son John and his heirs lawfully begotten, and if he should die without any issue lawfully begotten, then to his daughters for life, and after their decease to his brother John Dunning and his heirs male lawfully begotten, and for want of such issue to his right heirs for ever; and the said testator gave to his son John, after the decease of his mother, all the right and term of years which he had in the said lands included in the consent rule, and appointed Mary (his wife) and John (his son) executrix and executor of his will. The testator died the 17th of November, 1692, and his will was proved by the executor and executrix. The said John Dunning, the son, by indenture of the 5th of October, 1695, made in contemplation of his marriage with Mary Prowse, settled a part of the said leaseholds, describing them properly as such, in default of his having sons, on the daughters of the marriage. The said leaseholds afterwards passed from executor to executor, or were otherwise transferred as chattel interests, and ultimately vested in the said Richard Barré Baron Ashburton as aforesaid. The said Richard Barré Baron Ashburton was descended from the said John Dunning, son of the said Richard Dunning, and his collateral heir male herein mentioned was descended from the before-mentioned John Dunning, the brother of the same last-mentioned Richard Dunning.

The said Richard Barré Baron Ashburton had not, at the time of making his will, or at the time of his death, any other lands, either freehold or leasehold, in the parishes of Walkhampton and Buckland Monachorum, or either of them, than those included in the consent rule in the ejectment. The only lands which his lordship held at

the time of making his will, and at his death, in the parish of Meavy, were the freehold lands for which the defendant did not defend as aforesaid. His lordship was also seised, at the time of making his will, and at his death, of divers freehold lands, manors, and estates, besides the said freehold in Meavy, situated in the county of Devon, and which he devised to his wife as aforesaid. His lordship also held, at the time of making his will, and at his death, certain leasehold lands, situate in the county of Devon, which had been purchased by his father, for the residue of a term of ninety-nine years, determinable in November 1845, and which are now in the possession of Miss Margaret Baring, as surviving legatee under his lordship's will.

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The steward of the late Lord Ashburton proved at the trial, that he was steward from 1808 to the death of his lordship, and as such steward had the custody and entire control of the title-deeds in Walkhampton and Buckland Monachorum; that he prepared leases of those lands, which were executed by Lord Ashburton, reserving rent to his lordship and his heirs, and that he the steward did not know the state of the title to such lands, until the year 1824. This evidence of the steward was objected to by the counsel for the defendant; and if the Court, upon the argument, shall be of opinion that it is not evidence upon the construction of the will of Lord Ashburton, it is to be considered as struck out of the case.

After the death of the said Richard Barré Baron Ashburton, and in or about the month of May, 1823, the said will was proved in the Prerogative Court of Canterbury, by the said Anne Selby Lady Ashburton.

John Dunning, late of Gerard Street, in the city of Westminster, wine-merchant, duly made out his claim, shewing that he was the nearest collateral heir male of the said Richard Barré Baron Ashburton.

Immediately after the death of the said Richard Barré

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Baron Ashburton, the said Anne Selby Lady Ashburton entered into the possession of the said leasehold lands, included in the consent rule in this ejectment, and held and enjoyed the same for her own use and benefit, and continued in such possession from the time of the death of the said Richard Barré Baron Ashburton, to the time of her own death.

On or about the 8th of July, 1835, the said Anne Selby Lady Ashburton died, having first made her will, dated the 28th October, 1834, by which she gave and bequeathed unto the defendant, by the name and description of the Right Hon. James Lord Cranstoun, his executors, administrators, and assigns, for his and their own absolute use and benefit, all her leasehold estates in the counties of Devon and Middlesex, or elsewhere, and all the rest, residue and remainder of her personal estate whatsoever and wheresoever: and the said Anne Selby Lady Ashburton did, by her said will, appoint the said defendant sole executor thereof. At the time of the respective deaths of the said Richard Barré Baron Ashburton, and Anne Selby Lady Ashburton, the said John Dunning, late of Gerard Street, wine merchant, was the nearest collateral heir male of the said Richard Barré Baron Ashburton.

On or about the 6th of May, 1839, the said John Dunning, late of Gerard Street, wine merchant, died, leaving John Richard Dunning, one of the lessors of the plaintiff in this ejectment, his eldest son and heir at law, surviving him, and also leaving Thomas Fernée and Thomas Townshend, the two other lessors of the plaintiff, executors and residuary legatees of his said last will and testament.

The question for the opinion of the Court is, whether the leaseholds in the parishes of Walkhampton and Buckland Monachorum aforesaid, included in the consent rule in this ejectment, did, after the decease of the said Anne Selby Lady Ashburton, pass by the will of the said Richard

Barré Baron Ashburton to the said John Dunning, late of Gerard Street, wine-merchant, as nearest collateral heir male of the said Richard Barré Baron Ashburton, or not; if the Court shall be of opinion that the said leaseholds did pass to the said John Dunning, then the verdict to be entered for the plaintiff; but if the Court shall be of a contrary opinion, then a nonsuit to be entered.

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Fitzherbert, for the plaintiff, was stopped by the Court, who called on

Butt, for the defendant.—The question depends upon the construction to be put upon this will; and there are several authorities to shew, that under such a devise, nothing but the freehold manors and lands would pass to the devisee. [*Parke, B.*—Is not this case governed by *Day v. Trig (a)*? There a testator devised all his freehold houses in Aldersgate Street, when in fact he had no freehold houses there, but leasehold only, and it was held that the leasehold houses passed.] In that case there was not any property but leasehold to satisfy the devise; but here there is other property on which it could operate. The case of *Davis v. Gibbs (b)* is precisely in point. There a testatrix, seised of lands in Kent in fee and possessed of a mortgage for a term of years of the manor of Cranbroke in Essex, devised all her lands, tenements, and real estate in Kent and Essex to J. S. and his heirs; and it was held that the will would not pass the term, especially if there were any other clause in the will which disposed of the personal estate. Now, here there is personal property, and a residuary clause to dispose of it. The leaseholds would pass under the residuary clause, and therefore the Court is not driven to the construction contended for on the part of the plaintiff. If it be a question of intention, that

(a) 1 P. Wms. 286.

(b) 3 P. Wms. 26; *Fitzgib.* 116.

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must be collected from the will itself, and not from any extrinsic evidence. *Rose v. Bartlett* (a), *Miller v. Travers* (b).

In these cases, the question is not what the testator meant to do, but what is the meaning of the words he has used in the will. In this clause, he deals only with the freehold lands. All that he could entail was the freehold property in Meavy, and that satisfied the devise. To give effect to the construction contended for, it will be necessary to strike out the words "freehold," and insert "leasehold" wherever that word occurs. There are several cases to shew that, where a devise contains clear words of reference to a particular species of property, this court will not construe it to include other kinds unless there be a distinct expression of the intention of the testator in favour of such a construction. *Roe dem. Conolly v. Vernon* (c), *Doe dem. Tyrrell v. Lyford* (d), *Doe dem. Ashforth v. Bower* (e), *Hobson v. Blackburn* (g), *Thompson v. Lawley* (h), *Doe dem. Brown v. Brown* (i).

PARKE, B.—This is a case which is perfectly clear. The rule is, that where any property described in a will is sufficiently ascertained by the description, it passes by the devise, although all the particulars stated in the will with reference to it may not be true. The question here is, does this testator mean to devise any particular estate which can be ascertained from the will? If he does, then the describing it to be freehold instead of leasehold would not affect the devise; for the maxim is,—*Falsa demonstratio non nocet*. Then, does not this will clearly point out certain distinct and separate lands? The testator says, "Whereas it appears to me, that one part of my said

(a) Cro. Car. 292.

(b) 8 Bing. 244.

(c) 5 East, 51.

(d) 4 M. & Selw. 550.

(e) 3 B. & Ad. 453.

(g) 1 Mylne & K. 571.

(h) 2 Bos. & Pull. 303.

(i) 11 East, 441.

freehold lands, namely, those which I hold in the parishes of Walkhampton, of Buckland Monachorum, and of Meavy," (which is, in other words, those lands which I hold in each separate parish), "were held for a considerable period of time by my father's ancestors in the male line, bearing the name and arms of Dunning, as hereditary proprietors of the same; I therefore consider it just and equitable that those lands should continue to be held, if possible, by persons of the same name and family, &c., &c." It appears to me, that he ascertains the lands very clearly, by specifying them as lands held by his father's ancestors as hereditary proprietors. There are lands in each of those parishes which have been held by those ancestors from generation to generation for a long period of time; and though those lands are leasehold, can there be a doubt that he points to them? If not, then we have only to reject as surplusage the words indicating them to be freehold, and the devise will be as complete as if the lands were set out by metes and bounds, or by the tenants' names, or by any other peculiar marks by which they might be designated. The term "freehold" is a description of the tenure, and not of the lands themselves, and may be rejected, as was done in the case of *Day v. Trig*, which is precisely in point to the present case. In Com. Dig. Fait, E 4, it is said, "If the thing described is sufficiently ascertained, it is sufficient, though all the particulars are not true; as if a man conveys his house in D. which was R. Cotton's, when it was Thomas Cotton's." *Davis v. Gibbs* was the case of a general devise of the testator's lands, tenements, and real estate, and is distinguishable from the present case, with respect to which there is no room for any doubt whatever.

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ALDERSON, B.—I am of the same opinion. It appears to me to be quite clear that all the lands in the three parishes, held by the Dunnings as their hereditary property,

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GURNEY, B., and ROLFE, B., concurred.

Judgment for the plaintiff.

ROWCLIFFE v. EDMONDS and WIFE.

A declaration for the following words, alleged to have been spoken by the defendant's wife, of the plaintiff:—"You robbed me, for I found the thing you have done it with."—*Held*, that the words were actionable per se, without any colloquium or innuendo to explain the sense in which they were used.

THIS was an action of slander, for the following words alleged to have been spoken by the defendant's wife of the plaintiff:—"You (meaning the plaintiff) robbed me, for I found the thing you (meaning the plaintiff) have done it with." The defendant demurred specially to the declaration, on two grounds: first, that it did not appear of what thing the alleged robbery was committed, or whether the discourse concerned a subject matter, in respect of which a felony could be committed in law; secondly, that it did not appear whether the defamatory language was spoken before or after the marriage of the defendants; for if spoken after the marriage, no action would lie, inasmuch as no felony could be committed of the goods of a feme covert, who cannot be understood to have any. Joinder in demurrer.

Butt, in support of the demurrer,—cited *Charnel's case* (a) as an authority in support of the latter objection. [*Alderson*, B.—The wife may be robbed of her husband's goods. She does not say they were *her* goods.] Secondly, the word "robbed" does not necessarily import an imputation of felony. In *Tomlinson v. Brittlebank* (b), the words, "he robbed J. W.," were certainly held actionable, as imputing an offence punishable by law, unless the de-

(a) Cro. Eliz. 279.

(b) 4 B. & Adol. 630; 1 Nev. & M. 455.

fendant shewed that they were used in some other sense: but there *Littledale*, J., differed, and said he did not think the term "to rob" necessarily meant taking goods from another by force in the sense of the statute. There, also, the question arose after verdict; here it is on special demurrer. [*Parke*, B.—That can make no difference, as to this argument.] In *Day v. Robinson* (a), a count laying these words, "you have robbed me of one shilling tan money," was held bad after verdict. [*Parke*, B.—An indictment for robbery has been held sufficient, in which it was merely alleged that the defendant "feloniously robbed A. B." It would be strange if more particularity were required in a declaration for slander than in an indictment. *Prima facie*, a robbery means an unlawful taking with violence, and must be so understood, unless it appears from the context, or is shewn by the defendant, that it was meant in some other sense, which is not the case here.] It should be stated what was stolen, that the Court may judge whether it was a felony. [*Parke*, B.—Suppose the words had been, "You robbed A. B. on the highway, put him in bodily fear, and took something from him, but I do not know what," would they not be actionable? *Alderson*, B.—Or suppose they were, "You have been guilty of murder," without saying of whom, could it be contended the murder alluded to might be of a sheep, and not of a man?]

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PARKE, B.—You have no authority to cite for your position, and we are not disposed to make one.

The rest of the Court concurring,

Judgment for the plaintiff.

(a) 1 Ad. & Ell. 554; 4 Nev. & M. 884.

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WEETON and Others v. Woodcock and Others.

The right of a tenant to remove tenant's fixtures continues only during his original term, and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant.

Where, therefore, the term, pursuant to a proviso in the lease, was forfeited by the bankruptcy of the lessee, and the lessor entered upon the assignees, in order to enforce the forfeiture, and three weeks afterwards the assignees of the lessee, still continuing in possession, removed and sold a fixture put up by the lessee for the purposes of trade; and the jury found that it was not removed within a reasonable time after the entry of the lessor:—*Held*, that they had no right so to remove it, and that the lessor might recover it in trover.

And *semble*, such would have been the case even without such finding of the jury.

TROVER for a steam-engine boiler. Pleas, 1st, not guilty; 2ndly, that the plaintiffs were not possessed as of their own property: on which issues were joined. At the trial before *Erskine, J.*, at the last Liverpool Assizes, it appeared that the defendants were the assignees of one J. F. Taylor, a bankrupt. The plaintiffs, together with one Philip Newton (since deceased), had demised to Taylor, by indenture, a cotton factory, with the warehouse, counting-house, engine, and engine-house, &c. &c. implements, tackle, furniture, and machinery, the property of the plaintiffs and Newton, to the said factory and steam-engine belonging, and therewith used and enjoyed, &c. &c., for a term of seven years from the 12th of May, 1836. The lease contained covenants by Taylor to keep the premises in repair, to keep up a good steam-engine, with a boiler of beaten iron of certain dimensions, and at the end or sooner determination of the term, to leave and deliver up possession of the premises, and all the things therein, in good repair, or to pay the lessors the value of such as were not so left; with a proviso for re-entry in case of the bankruptcy of Taylor, and a fiat issuing thereon, or upon non-performance of any of the covenants. The steam-engine boiler in question was set up by Taylor during his tenancy, and annexed to the engine. It was built round with brick, and firmly fixed to the floor and walls of the engine-house; being, according to the statement of the witnesses, more firmly annexed than it was usual at a subsequent period to annex such boilers. In April 1838, Taylor committed an act of bankruptcy, and on the 16th of that month a fiat in bankruptcy issued against him, under which the defendants were appointed

assignees, and took possession of the bankrupt's property. A breach of the covenant to repair had been committed previously to the issuing of the fiat; and on the 30th of May, 1838, the plaintiffs made an entry on the premises, in order to enforce the forfeiture. The assignees, however, retained possession, and about the 20th of June following sold the boiler, and it was subsequently removed from the premises. It was contended for the plaintiffs, first, that they were entitled to recover under the covenant, to keep up the engine and boiler, and to leave them on the premises at the determination of the term; and further, that independently of the language of this particular covenant, they were entitled to the boiler as being a fixture, and not having been removed during the term. The learned Judge left it to the jury to say whether the boiler was a fixture; and if so, whether it had been disannexed within a reasonable time after the entry of the plaintiffs. The jury found it to be a fixture, and that it had not been disannexed within such reasonable time; and a verdict was entered for the plaintiffs for £87, leave being reserved to the defendants to enter a nonsuit, if the Court should be of opinion that the plaintiffs were not entitled under the covenant, and that the defendants, as assignees of the lessee, had a right to remove the boiler so long as they remained in possession.

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In Michaelmas Term, *Wightman* obtained a rule accordingly; against which, in Easter Term,

Cowling (*Cresswell* was with him) shewed cause.—The plaintiffs shape their case in two ways: first, they allege that they are entitled to recover under the general law relating to fixtures, this boiler being a trade fixture, left on the premises after the determination of the term, and the property in which reverted in the lessors; or, secondly, that the defendants cannot claim it as assignees of the tenant, by reason of the covenant. First, this was a

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fixture, and as such vested in the plaintiffs, on the determination of the term by their entry upon the forfeiture. This would clearly have been the case if the lease had expired by effluxion of time; but it will be argued on the other side that the rule is different in cases of forfeiture: the authorities, however, do not warrant any such distinction. It is by the default of the tenant that the term is determined, and he cannot be in a better position than if it had expired by mere lapse of time. It will be said that the general rule cannot apply, because the tenant must in such a case have a reasonable time in which to remove the fixtures. Here, however, the jury have expressly found that the boiler was not disannexed within a reasonable time after the plaintiffs' entry. But the law is correctly stated in Messrs. Amos and Ferard's *Treatise on the Law of Fixtures*, (p. 87), that a tenant must use his privilege in removing fixtures *during the continuance of his term*; for if he forbear to do so within that period, the law presumes that he voluntarily relinquishes his claim in favour of his landlord. This was expressly recognised as the correct rule of law on this subject, in the case of *Lyde v. Russell* (a). So, in *Hallen v. Runder* (b), Parke, B., says:—"When chattels are fixed to the freehold by the tenant, they become part of it, subject to the tenant's right to remove them *during the term*, and thus reconvert them into goods and chattels." But it has in truth been decided in this very case, that this boiler was a fixture, and as such became the property of the landlord. During the argument on the question as to the joinder of a special count with the count in trover, Parke B., said (c):—"Does not the declaration aver that the boiler was fixed to the freehold? then, if so, it belongs to the landlord after the determination of the term." The only authority

(a) 1 B. & Adol. 394.

(b) 1 C., M., & R., 275.

(c) *Weeton v. Woodcock*, 5 M. & W. 591.

which appears adverse to the plaintiffs is that of *Penton v. Robart (a)*, in which it was held that a tenant was entitled to remove a trade erection while he continued in possession of the land, although after the expiration of the term. But there the lessor was in possession only by relation of law, and the defendant was tenant at sufferance: here, by the entry of the plaintiffs upon the forfeiture, the estate reverted in them, and the assignees from that time became trespassers. There, also, the defendant did not claim directly from the plaintiff. If the assignees could remove this boiler three weeks after the plaintiffs' entry, why could they not six months afterwards? It cannot be said that that was a reasonable time for the purpose, even supposing that the law allowed them such an indulgence.

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But at all events, the covenant operated to prevent the defendants from acquiring any right of removal. It may be said it gives the lessors only a remedy in covenant; but it is submitted that it clearly operated to take away the common-law right of removal. [*Alderson, B.*, referred to *Fairburn v. Eastwood (b)*.] That case is distinguishable; there the parties were reversed, and the covenant was different in its terms from the present.

Wightman and Crompton, contra.—The right of the plaintiffs, under the lease, lay wholly in covenant, and the learned Judge so thought at the trial. The main question however is, whether the defendants had a right of removal after the determination of the term by the forfeiture. In the cases cited on the other side, there was an attempt to remove the fixture not only after the term had determined, but after the tenant was out of possession: and his quitting the possession was rightly held to be evidence that he had abandoned his right of removal, and given the articles up to the landlord, since he could not repossess himself of

(a) 2 East, 88.

(b) 6 M. & W. 679.

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them without committing a trespass. But there is no such presumption where the lessee continues in possession: and *Penton v. Robart* is a direct authority that in such case he retains the right of removal. It has been attempted to distinguish that case from the present, on the ground that here there has been an entry upon the forfeiture; but there the plaintiff had actually recovered in ejectment against the defendant, so that the latter held over as a mere trespasser. In *Colegrave v. Dias Santos* (a), *Abbott*, C. J., referring to the judgment of *Gibbs*, C. J., in *Lee v. Risdon* (b), says,—“According to that opinion, nothing can now be done with respect to those things which may be considered as fixtures, whatever power the plaintiff might have had *before he gave up the possession*.” The authority of *Penton v. Robart* was recognised by this Court in the cases of *Minshall v. Lloyd* (c), and *Mackintosh v. Trotter* (d). In the former case *Parke*, B., said:—“One question is, whether, in strict law, the plaintiffs, who represent the lessee, could derive from him any greater right than to remove the fixtures during the term, or while they continued in possession after the term.” And in *Mackintosh v. Trotter* the same learned Judge laid it down as the rule of law, “that the tenant has a right to remove fixtures of this nature [tenants’ fixtures] during his term, or during what may for this purpose be considered as an *excrescence* on the term.” The passage cited from *Amos & Ferard on Fixtures*, applies to cases where the tenancy is determined by the act of forfeiture itself. Here the tenant has not so given up possession as that the law presumes a gift to the reversioner. If this view of the case be correct, the question of the *reasonableness* of the time is wholly immaterial, and the finding as to it does not alter the right of the defendants.

Cur. adv. vult.

(a) 2 B. & Cr. 79.
(b) 7 Taunt. 188.

(c) 2 M. & W. 456.
(d) 3 M. & W. 184.

The judgment of the Court was now delivered by

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ALDERSON, B.—In this case we took time to consider whether the assignees of the bankrupt had, under the circumstances, proved the right of removing the tenant's boiler, which was a fixture. It appeared that the landlord had made, on the 30th of May, 1838, an entry to avoid the lease after a forfeiture committed, and that subsequently to that entry, though not (as the jury have expressly found) within a reasonable time after it, the assignees, still continuing in possession, removed and sold the boiler in question. The point is, whether they had the right so to do.

The rule to be collected from the several cases decided on this subject seems to be this, that the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him, as he holds the premises under a right still to consider himself as tenant. That was the rule on which this Court acted in *Minshall v. Lloyd (a)*, in which Mr. Baron Parke, in giving his judgment, puts it on the ground that there was "no doubt that in that case the steam-engines were left affixed to the freehold after the expiration of the term, and after the plaintiffs had any right to consider themselves tenants." In the present case, also, this boiler was removed after the entry for a forfeiture, and at a time after the assignees had ceased to have any right to consider themselves as tenants. And further, even if they had the right, in a case where the entry determining the tenancy is the act of a third person, to consider themselves entitled to a reasonable time for removing the fixture, the jury have found that they did not avail themselves of that privilege. The rule, therefore, for a nonsuit must be discharged.

Rule discharged.

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MORTIMER v. M'CALLAN.

Indebitatus assumpsit for stock sold and caused to be transferred by the plaintiff to the defendant, and by the defendant duly accepted.

Plea, that the stock alleged to be caused to be transferred was so caused to be transferred by virtue of an agreement with the plaintiff for the transfer of the same in consideration of 4531*l.* 5*s.*, to be therefore paid to the plaintiff for the same; and that at the time of the making of such agreement the plaintiff was not actually possessed of or entitled to the stock in his own right &c., by means whereof the said contract became and was null and void :—
Held, that the plea was no answer to the action, and that the contract was not within the 7 Geo. 2, c. 8, s. 8.

ASSUMPSIT.—The first count of the declaration alleged, that the defendant heretofore, to wit, on the 7th day of October, 1839, was indebted to the plaintiff in the sum of £5000, for certain, to wit, £5000 interest or share in the joint stock of 3*l.* per cent. Annuities, transferable at the Bank of England, called the Consolidated 3*l.* per cent. Annuities, then sold and caused to be transferred by the plaintiff to the defendant, at his special instance and request, and by the said defendant, then, to wit, on the same day and year aforesaid, duly accepted.

Plea, as to the first count, that the said interest or share in the said joint stock in the first count mentioned, and therein alleged to have been caused to be transferred by the plaintiff to the defendant, was so caused to be transferred under and by virtue of a certain contract and agreement made with the plaintiff after the 1st day of June, 1734, viz. on the 7th day of October, 1839, for the transfer, on the day and year last aforesaid, by the plaintiff to the defendant, of the said sum of £5000 interest or share in the said joint stock in the said first count mentioned, for and in consideration of the sum of 4531*l.* 5*s.* to be therefore paid to the plaintiff for the same; and the defendant further says, that, at the time of the making of such contract and agreement, the plaintiff was not actually possessed of or entitled unto, in his own right, or in his own name, or in the name or names of any trustee or trustees to his use, of the said interest or share in the said joint stock in the first count mentioned, or of any part thereof, by means whereof the said contract and agreement, and the said promise in the said declaration mentioned, so far as the same relates to the said first count, then became and was, and from thence hitherto hath been and still is, according to the form of the statute

in such case made and provided, null and void to all intents and purposes whatsoever. Verification.

General demurrer, and joinder.

The point marked for argument in the margin of the demurrer-book was as follows:—The matter of law intended to be argued by the plaintiff is, that, to a cause of action for stock actually transferred and accepted upon a contract for payment, the matter stated in the second plea is not an answer.

The case was argued in Easter Term last, by

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Cresswell, in support of the demurrer.—First, the statute 7 Geo. 2, c. 8, s. 8, does not apply to a transaction of this nature, but was intended to apply to contracts, not for an actual transfer of stock, but merely for differences to be paid by the one party or the other, according as the stock may rise or fall; but, secondly, at all events, when the stock has been transferred pursuant to a contract of the nature stated on this record, and the defendant has accepted that stock, he is bound to pay for it. The act is intitled “An Act to prevent the infamous practice of Stock Jobbing,” and it recites “that great inconveniences have arisen, and do daily arise, by the wicked, pernicious, and daily practice of stock-jobbing, whereby many of his Majesty’s good subjects have been and are diverted from pursuing and exercising their lawful trades and vocations, to the utter ruin of themselves and families, to the great discouragement of industry, and to the manifest detriment of trade and commerce;” shewing that it was not directed against an intention in the one party to invest his money in the funds, and in the other to sell and transfer stock. The 1st section is directed against “contracts for liberty to put upon, accept, or refuse any public stocks or securities, and wagers relating to the value of stock,” which it declares shall be void, and the money paid thereon restored; the 2nd, 3rd, and 4th sections are also directed

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against transactions of the same nature. The 5th section imposes a penalty of £100 on giving or receiving money to compound differences relating to stock not actually delivered; again shewing that the intention was not to disturb transactions that are bonâ fide for the sale and delivery of stock. The 6th section provides, "that no person or persons who shall sell any public or joint stock or other public securities, to be delivered and paid for on a certain day, and which shall be refused or neglected to be paid for according to such agreement, shall be obliged to transfer the same; but it shall and may be lawful for such person or persons to sell such stock or other securities which shall be so refused or neglected to be paid for, to any other person or persons, for the best price which can be obtained." There was, perhaps, a doubt at that time, whether, after a contract had been made, and the stock was not received and paid for, it could be lawfully sold to another person; and it was to remove that doubt that the 6th section was introduced; so, if a person contract for stock, and it is not tendered at the appointed time, he has a right to buy other stock, and sue the former person with whom he contracted for the difference. The 7th section is for equal relief to the buyer. Then comes the 8th section, which recites, that "it is a frequent and mischievous practice for persons to sell and dispose of stocks, or other securities, of which they are not possessed." Now it is apprehended that, considering the title, the preamble, and the scope of the different parts of the act, it was not intended to include such a transaction as the present, where a bonâ fide sale of stock was contemplated; but purely to prevent parties from bargaining with respect to stock in which they had no interest, and did not intend to acquire an interest—in fact, non-existing stock; which was the construction put by Lord *Ellenborough* on the statute. Then it is enacted, "that all contracts and agreements whatsoever which shall,

from and after the 1st day of June, 1784, be made or entered into for the buying, selling, assigning, or transferring of any public or joint stock or stocks, or other public securities whatsoever, or of any part, share, or interest therein, whereof the person or persons contracting or agreeing, or on whose behalf the contract or agreement shall be made, to sell, assign, and transfer the same, shall not, at the time of making such contract or agreement, be actually possessed of or entitled unto in his, her, or their own right, or in his, her, or their own name or names, or in the name or names of a trustee or trustees to their use, shall be null and void to all intents and purposes whatsoever." Therefore it must be void as to both parties. If such a contract as is here mentioned is to be void to all intents and purposes, it must be a contract which the contractor to buy could never enforce, any more than the contractor to sell, and therefore it is impossible to suppose that such a provision should have been framed, to render a contract void which was made for the sale and actual transfer of stock, and not merely with reference to the differences; because, suppose the buyer, having money in his hands to invest, is desirous of buying stock, and he applies to a party to sell him a certain amount of stock, and that party contracts to do it, not doubting that he can immediately procure stock for the purpose of making the transfer, is the purchaser, who does not know but that the seller has stock standing in his own name, or in the name of a trustee for him, to suffer for it? and is it to be said, as against him, that the contract is void altogether? And yet, if the statute applies to a contract of this description, it will have that effect.

There are several cases which shew that this statute has not been construed literally, or as extending to bonâ fide transactions. In *Sanders v. Kentish* (a), which was an action

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for not transferring stock into the plaintiff's name, the plaintiff being possessed of £3000 4l. per cent. stock, empowered the defendant to sell the same for his own benefit, in consideration of which, the defendant agreed to transfer at the next opening £3000 4l. per cents. into the plaintiff's name; and it was held that this was not a case prohibited by the 7 Geo.2, c. 8, s. 8, but that on failure of the defendant's engagement, the plaintiff might maintain an action against him to recover the value of that stock on the day appointed for the transfer. And Lord *Kenyon*, in giving judgment, said:—"The case is shortly this: the defendant *Kentish*, who is a stock-broker, and who was therefore most probably acquainted with the statute on which his counsel has now relied, applied to the plaintiff, a clergyman, who was probably ignorant of that law, and obtained from him a loan of £3000 stock, on an undertaking to replace the same stock on a given day; from this transaction the plaintiff was to derive no advantage whatever. The plaintiff gave him a letter of attorney, empowering him to sell the stock; he then put the money into his pocket, and when the day of payment arrived, refused to pay the plaintiff, insisting that the statute of Geo. 2 rendered the contract void; and that therefore the plaintiff cannot enforce that contract in a Court of law. To be sure, if such were the positive provisions of that statute, the consequence must follow, however hard it might press upon the plaintiff; but before we assented to so monstrous a proposition, we would look with eagles' eyes into every part of the statute, to see that such was the intention of the legislature. Their intention is to be collected from the whole act taken together. The act is intitled, 'An Act to prevent the infamous Practices of Stock-jobbing.' But if the defendant's objection were to prevail, the title of the act ought to be altered, and it should run thus,—'An Act to encourage the wickedness of stock-jobbers, and to give them the exclusive privilege of cheating the rest of

mankind.' On considering the whole of the act together, *Exch. of Pleas*,
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 gambling in the funds; but the legislature did not mean
 to prohibit a loan of stock, and an undertaking to replace
 it. I do not think that this case comes within the meaning
 of the prohibitory clauses in the act, but it is within the
 exception in the last section." In *Oliverson v. Coles (a)*,
 which was an action on a special undertaking, in consider-
 ation that the plaintiff would sell out Omnium to the amount
 of £2000, to replace the same in stock, or to give the plain-
 tiff the current price for it if he required it: it was objected,
 at the trial, that the contract was illegal, as amounting to
 an agreement to replace stock in consideration of selling
 out Omnium which was not stock, and might never eventu-
 ally become stock; for if default were made in one pay-
 ment, the previous payments would become forfeited,
 and so whether it might eventually become stock rested
 upon a contingency. But Lord *Ellenborough* said, "A
 person who has Omnium is potentially in possession of
 stock. The case certainly differs from that of a sale of
 actually existing stock, but it does not come within the
 mischief intended to be guarded against by Sir John
 Bernard's Act." Lord *Ellenborough* therefore appears to
 have considered that the act was directed exclusively
 against the sale of stock which was not actually existing.
 —He was then stopped by the Court, who called upon

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Sir *W. W. Follett*, who appeared in support of the plea.
 —According to the true construction of this act of Parlia-
 ment, this action is not maintainable. It must be recol-
 lected that the plaintiff in this case is what is called a stock-
 jobber; that is, a person professing to sell without having
 the stock in his possession. It is not the case of a party
 buying *bonâ fide* of a person whom he supposes to possess
 the stock, but that of a person selling stock which he knows

(a) 1 Stark. 496.

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he has not the possession of. The plaintiff not being possessed of any stock, and therefore, at least as far as he is concerned, the stock being non-existing stock, enters into a contract to sell or transfer a certain quantity of stock to the defendant; the defendant agrees to pay a certain price for it, and the stock is to be transferred. At the time when the transfer is to take place, the plaintiff does cause a transfer to be made; whether he gains or loses by that speculation does not appear, nor is it important. The question is, in the case of a party bargaining to transfer stock of which he is not the owner, whether that bargain is not made absolutely void by this act of Parliament; and for that purpose it will be necessary to consider its several enactments.—The first seven sections are directed against bargaining for differences, putts, and refusals; and the 1st section declares all such contracts to be void. The 2nd obliges persons sued upon them to answer upon oath any bill filed for the discovery of such contracts. By the 3rd, the plaintiff, on filing a bill, is to give security for answering costs, otherwise the defendant may refuse to appear. Then, by the 4th, a penalty of £500 is imposed for making or executing any such putts or bargains; putts being contracts for the transfer of stock on a certain day, which the party may either accept or refuse on paying or receiving the difference—which are now called “time bargains.” Then comes the 5th section: “And for preventing the evil practice of compounding or making up differences for stocks or other securities bought, sold, or at any time hereafter to be agreed so to be, Be it further enacted, That no money or other consideration whatsoever, (except as hereinafter is provided), shall, from and after the said 1st of June, 1734, be voluntarily given, paid, had, or received for the compounding, satisfying, or making up any difference for the not delivering, transferring, having, or receiving any public or joint stock, or other public securities, or for the not performing of any contract

or agreement so stipulated and agreed to be performed; but that all and every such contract and agreement shall be specifically performed and executed on all sides, and the stock or security thereby agreed to be assigned, transferred, or delivered, shall be actually so done, and the money or other consideration thereby agreed to be given and paid for the same shall also be actually and really given and paid:" and a penalty of £100 is imposed upon parties offending against this provision. Then in the 6th section there is a distinct enactment, that stock sold and not paid for at the time prefixed may be resold, and the party is to pay the damage sustained: and by the 7th, the buyer may purchase other stock and recover the damage. These sections of the act completely provide for what is contended on the other side to be the only object of the act, namely, the preventing time bargains or compounding for differences. And there is nothing extraordinary in supposing, when the legislature meant to put down every species of gambling in the public funds, that they should have enacted that no sale of government stock should be valid, unless the party was possessed of it at the time of the contract, in order to prevent anything with even the colour of gambling, which they intended to put down entirely. The act, to prevent gambling, or the colour of gambling, says, that no person shall sell stock unless he is the actual bonâ fide holder of it. Accordingly, after it has provided by the preceding sections for time bargains and differences, it then commences the 8th section with another preamble:—"and whereas it is a frequent and mischievous practice for persons to sell and dispose of stocks, or other securities, of which they are not possessed:"—that is, of which they are not the actual holders at the time of sale,—parties bargaining for stock or securities of which they are not the holders,—of which they are not possessed. It then goes on to enact, "that all contracts and agreements made or entered into for the buying, selling, assigning, or

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transferring of any public or joint stock or stocks or other public securities whatsoever, or of any part, share, or interest therein, whereof the person or persons contracting or agreeing, or on whose behalf the contract or agreement shall be made, to sell, assign, and transfer the same, shall not at the time of making such contract or agreement be actually possessed of or entitled unto in his, her, or their own right, or in his, her, or their own name or names, or in the name or names of a trustee or trustees to their use, shall be null and void to all intents and purposes whatsoever."

Now, what is the meaning of these words, which, unless they are inconsistent with other parts of the act, must be taken in their plain grammatical sense? It is not pretended that this contract was made on behalf of any person who had the stock, but as these pleadings stand, a party who has no stock whatever, no interest in the public funds, and is not acting on behalf of any body who has, enters into a contract to transfer stock at a certain time, at a certain price; and the question is, whether the act has not said that in such a case the contract shall be null and void to all intents and purposes whatsoever. The cases which have been cited, instead of being authorities to shew that this transaction is legal, point the other way; they shew that unless it can be considered as a loan, and the retransfer is nothing more than restoring stock within the 11th section of the act, the case would be brought within the 8th section, and the contract would be void. In order to understand more fully the history of the law on this subject, it will be necessary to refer to the former acts. The first was an act of 8 & 9 Will. 3, c. 32, s. 10, which enacted, "for the further preventing the mischiefs that do daily arise to trade, by the ill practice of brokers, stock-jobbers and others, that every policy, contract, bargain, or agreement made and entered into, or to be made or entered into by any person or persons whatsoever, and which by the tenor thereof is to be performed, after the 1st

day of May, 1697, upon which any premium is or hereafter shall be given or paid for liberty to put upon or to deliver, receive, or accept, any share or interest in any joint stock tallies, orders, Exchequer bills, Exchequer tickets, or Bank bills whatsoever, other than and except such policies, contracts, bargains or agreements, of the nature aforesaid, as are to be performed within the space of three days, is and shall be null and void, to all intents and purposes, as if the same had never been made; and every such premium and premiums shall be paid back and restored to such person or persons who did give or pay the same." That enactment is directed against time bargains only, which are void, unless they are made to take place within three days: but it contains no provision relating to the sale of stock by persons not possessed of it. In *Smith v. Westall*, (a) where the contract was actually performed, it was still held to be within the meaning of that act. *Mitchell v. Broughton* (b) is another decision on the same act. It is well known that the practice of gambling in the funds had obtained to a very great height at the passing of Sir John Bernard's Act, as appears from the statute itself, and the object of it was to put down effectually all such gambling, by whatever means effected. It is enough to say that the legislature may have considered, that the only effectual mode of doing this would be to prevent a person from bargaining to sell stock, who had not got the actual stock in his possession. If such was their intention, it is no answer to say that here the parties were acting bonâ fide, and intended to transfer the stock. After the decision of this Court (c), it is not intended to argue that the opinion expressed by Lord Tenterden in *Bryan v. Lewis* (d), "that if a man sells goods to be delivered on a future day, and neither has the goods at the time, nor has any prior contract to buy them, nor has any

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(a) 1 Lord Raym. 317.

(b) Id. 673.

(c) *Hebblewhite v. M'Morine*, 5

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(d) Ry. & M. 385.

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reasonable expectation of receiving them by consignment, but means to go into the market and to buy the goods which he has contracted to deliver, he cannot maintain an action upon such a contract," can be supported on the ground of such a contract being illegal at common law. But suppose the legislature should think right, in such a case as that put by Lord *Tenterden*, with regard to any particular commodity in respect of which there was very mischievous gambling or speculation, to say, that no contract should be valid for that article, unless by a party who had the article in his possession, or in the possession of a trustee on his behalf, surely there could be nothing extraordinary in the legislature passing such an act. [*Parke, B.*—Lord *Tenterden* would not have said, if a person had actually delivered the goods, that he was not entitled to be paid]. If such a transaction as this is valid, it would be so, upon this declaration, if the stock were agreed to be transferred six months afterwards; but surely that would be a speculation upon the price of stock, which the legislature might very well be supposed to have intended to prohibit. [*Parke, B.*—The question is, whether the act of Parliament meant to prohibit anything but executory contracts. The first part of the 8th section appears to apply to cases where both parties are aware that they are contracting for the transfer and sale of that which the seller is not possessed of; otherwise the enactment at the end, that such contracts shall be void to all intents and purposes whatsoever, would be quite monstrous: for suppose I contract with another man who is entitled to stock, I meaning to buy existing stock at the time of the transfer, it never can be said that that contract should be void against me, if it turns out that the seller had no stock at that time: and therefore the words, "shall be null and void to all intents and purposes whatsoever," enable you to put a construction upon the first part of the section; and the first part of the section would

appear to apply to cases where both parties agree to buy, sell, or transfer stock which they know one of the parties has not. That is not this case.] There is a class of cases which has decided, that where the foundation of, or consideration for the contract is illegal, no action can be maintained to enforce it. Here the party seeking to enforce the contract is the person who violates the law. [*Parke B.*—That argument applies to the latter part of the section, in which a penalty is imposed upon every person “contracting or agreeing;” and the question is, whether the penalty is imposed upon the person selling, where there is an actual transfer of stock which he has contracted to sell, or only where he has contracted for a future sale of stock which he does not possess. This is a contract arising out of the actual transfer.] There are, undoubtedly, two points which it is incumbent on the defendant to make out,—first, that the 8th section applies to an actual sale of stock of which the party was not himself the owner, having the stock in his own possession or in that of a trustee; and next, that although that person, not having the stock to transfer, should have gone into the market and got the stock transferred, the transaction is so tainted with illegality that an action cannot be maintained for the price of it. If an act of Parliament says that a contract shall be void to all intents and purposes, and prohibits the making of it, then it is a common principle of law, that a party cannot maintain an action to recover payment in respect of it. With respect to the cases which have been cited, *Sanders v. Kentish* was the case of a person actually possessed of the stock, who transferred it to the defendants upon an undertaking that they would replace it; and the judgment of the Court is, that that was not a *sale* of stock within the meaning of the 8th section, but that it was a *loan* of stock which the parties were to replace. And Lord *Kenyon* says,—“On considering the whole of the act together, I am clearly of opinion that the

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object was only to prevent gambling in the funds; but the legislature did not mean to prohibit a loan of stock, and an undertaking to replace it. I do not think that this comes within the meaning of the prohibitory clauses in the act, but it is within the exception in the last section." That section is, "That nothing in this act contained shall extend, or be construed to extend to hinder or prevent any person or persons from lending any sum or sums of money, or any public or joint stock, or other public securities," &c. There is another case in the same volume, *Child v. Morley (a)*, which was cited at the trial as an authority for the plaintiff, that this action was maintainable; but if an authority either way, it is rather in favour of the defendant. There a broker contracted for the sale of stock at a future day, by the authority of his principal, who afterwards refused to make good the bargain; and it was held, that if the principal were really possessed of the stock so bargained to be sold, such contract was not illegal within the 7 Geo. 2, c. 8, although the broker did not disclose the name of his principal at the time of the bargain made; and that the purchaser might maintain an action, for the difference, against the principal. The objection there was, that the broker was not possessed of the stock, and therefore it was illegal under 7 Geo. 2, c. 8: the answer was, that "it is not a case within the statute regulating stock-jobbing; for that only applies to cases where there is an agreement for the transfer of stock, the pretended seller having really no stock to transfer, nor any actual sale being within the contemplation of the parties, but a mere gambling for the difference of the price between the times of making and executing the bargain." Now that is the argument which has been urged to-day; but Lord *Kenyon* says,—“There is no pretence to say that this is a stock-jobbing transaction within the statute.

(a) 8 T. R. 610.

The parties intended a bonâ fide sale of stock, of which Morley, on whose account it was sold, *was then actually possessed*; and the question is, whether this may not be done through the intervention of a broker, though he does not disclose his principal at the time, of which no doubt can be made." Mr. Justice *Lawrence* goes even further: "My difficulty is this—if Child contracted to sell the stock on his own account, then the case falls directly within the prohibition of the act of Parliament, *because he really was not possessed of the stock so bargained and sold*." Now there nobody doubted the bona fides of the transaction; it was an actual purchase, an actual intended sale: one party intended to buy at a certain price, the other intended to transfer, bonâ fide, on a certain day. Mr. Justice *Lawrence* says, notwithstanding, that if Child had been the actual vendor, the case would have been within the words of the act of Parliament; but he makes the distinction which Lord *Kenyon* had made, that it was a sale on behalf of Morley, and therefore it was a good sale. So here, if the plaintiff had sold the stock on behalf of another person who was possessed of it, that case would be an authority: but he sells it on his own account, without being possessed of it, and upon a speculation of what the price may be; he then goes into the market and obtains it, and then transfers it.

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There is one other case upon this subject, that of *Heckscher v. Gregory* (a). It was there held, that in an action on the 7 Geo. 2, c. 8, s. 6, to recover damages against one who had refused to accept and pay for stock agreed to be sold to him, it is necessary to prove an actual transfer of the stock to some other person before the action brought: and proof alone of a contract to sell to such other person before the action brought, though followed up by an actual transfer afterwards, is

(a) 4 East, 607.

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not sufficient to sustain the action. Lord *Ellenborough* says:—"The object of the act was to prevent radically all dealings in stock by persons who were not proprietors, and who should not actually make a transfer of their interest in the stock. And therefore, to entitle the proprietor to recover damages in any case for the non-performance of a contract for the purchase of his stock, he must either specifically carry that contract into execution, by first making a transfer to the party with whom he contracted, according to the fifth section; or, in case of the insolvency or inability of the latter, by first making an actual transfer to a substituted purchaser, according to the provision of the sixth section, and then he may recover the difference against the original contractor. But in no case shall any consideration be voluntarily paid for the compounding any difference for the not transferring of stock; but there must be an actual transfer, and then the difference between the purchase-money contracted for and that actually received shall be the measure of the damage to be recovered." The whole of this judgment goes entirely upon the ground that there must be a *real transaction*; that is, a transaction with the actual owner of the stock at the time. All the cases, indeed, proceed upon the assumption that the contract, to be valid, must be a contract made by the actual owner of the stock, or some person on his behalf.

The doctrine laid down by Lord *Tenterden*, in *Bryan v. Lewis*, first came under review in two cases of *Wells v. Porter* (a) and *Oakley v. Rigby* (b), and afterwards in a case of *Elsworth v. Cole* (c), in which this Court expressed their concurrence with the two former decisions, and in which it was held that time bargains in *foreign* funds are not within the prohibition of the 7 Geo. 2, c. 8, nor illegal at common law. *Wells v. Porter* was an action for work and labour, to which there was a plea, that the work and

(a) 2 Bing. N. C. 722.

(b) *Ibid.* 732.

(c) 2 M. & W. 31.

labour was done by the plaintiff as a broker and agent, in and about the delivery of foreign stock, so as to bring it within the statute. All the cases of actions brought by brokers are for work and labour *actually done*, and yet no question has ever arisen that the act of Parliament might not be pleaded as an answer. If a broker is employed upon an illegal transaction, although he actually does the work, and actually lays out his money, he cannot recover. Why? Because he cannot establish his right, except by virtue of having done something in contravention of the act of Parliament; and the fact of the work being actually done is no answer whatever to the objection. [Parke, B.—No doubt, if the thing is prohibited; the doubt in this case is, whether an actual transfer of the stock, and a contract to pay for the stock so actually transferred, is prohibited by the statute. If it is, you cannot sue for it.] The argument is, that it is distinctly prohibited by the act of Parliament. But in *Wells v. Porter*, the Court were of opinion that this act applied only to the British funds. And Tindal, C. J. says, with reference to what fell from Lord Tenterden in *Bryan v. Lewis*, “I do not see my way with sufficient clearness to say that any part of the transaction would be illegal at common law;” and he expressed the same doubt in *Oakley v. Rigby*.

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The other point is, whether the stock's having been actually transferred makes any material difference in the case.—It is submitted, that the effect of this statute is to make void altogether—that is, to declare illegal, for that is sufficient—a contract entered into for the sale of stock by a party who is not the absolute owner of it at the time. It is not necessary to contend, that if a person goes into the stock-market and buys stock of another whom he supposes to be possessed of stock at that time, but who turns out not to be so, he cannot maintain an action against that person for not performing the contract. It may be that the Court would hold that a person en-

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tiely ignorant of the fact might enforce the contract, and would not allow the defendant to set up the illegality of his own conduct. It is unnecessary for the defendant to contest that; but it is contended, that a person who is himself aware of the facts, and is guilty of a violation of the act knowingly, cannot make that contract a ground of any claim in a court of law, whether it be carried into effect or not. The 8th section begins by reciting, "Whereas it is a frequent and mischievous practice for persons to sell and dispose of stock or other securities of which they are not possessed." There is the opinion of the legislature distinctly expressed, that it is a mischievous practice. It then goes on to enact as before stated. In the first place, there is a distinct statement, that a contract entered into by a person not having stock either himself or by a trustee for his benefit, shall be null and void. Then, further, it enacts, "That all and every person and persons whatsoever, contracting or agreeing, or on whose behalf and with whose consent any contract or agreement shall be made, to sell, assign, or transfer any public or joint stock or stocks, or other public securities, whereof such person or persons shall not, at the time of making such contract or agreement, be actually possessed of or entitled unto in his, her, or their own name or names, or in the name or names of a trustee or trustees to their use, and in their own right as aforesaid, shall forfeit and pay the sum of £500, to be recovered by action in any of his Majesty's Courts of Record." In the first place, the contract is declared to be void, and in the next place, the party so selling is liable to a penalty of £500. So heavy a penalty being imposed, the Court will no doubt look at the act of Parliament very closely, to see that the case comes clearly within it; but when it is examined, the Court will be constrained to adopt the construction, that a party who sells stock not being the owner of it, is liable to the penalty. And there can be no hardship in this. If the legislature, having created public

stocks, had said, no one shall make a bargain for the sale of those stocks unless his name as the owner be inscribed in a book; if a party does so in direct violation of the act, there can be no hardship in his being compelled to pay the penalty. It is a mistake to suppose that the title of the act has anything to do with the question. It has been held in various cases that the title is no part of the act, and is no guide at all in the construction of it. [Lord Abinger, C. B.—The title cannot restrain the act, neither can the preamble.] It was so decided in *Rex v. Williams* (a) and *Cameron v. Cameron* (b). But it is said, that the stock having been in fact transferred, the action is therefore maintainable; but where the thing is prohibited and made illegal by act of Parliament, that can make no difference; as has been held in cases where penalties have been imposed for the breach of certain revenue regulations, for instance, with respect to the sale of bricks; or in the case of printers omitting to print their names on papers or books printed by them; or in the case of money expended in treating at elections. [Lord Abinger, C. B.—Those cases would be very applicable to this act of Parliament, if it had said that it should be illegal to transfer stock sold under such a bargain.] It is apprehended that it does say so in effect, when it says that the contract shall be void, and imposes a penalty. The acts relating to the matters before mentioned do not say in terms that those things shall not be done; they only impose a penalty, if any one does what the act describes. It is *malum prohibitum*, and so it is here. There is a variety of cases where it has been determined that, under such circumstances, no action can be maintained. [On this point he cited *Ribbans v. Crickett* (c), *Bensley v. Bigs* (d), *Cope v. Rowlands* (e), *Wilkinson v. Loudonsack* (g),

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(a) 1 W. Bl. 95.

(b) 2 Mylne & K. 292.

(c) 1 Bos. & P. 264.

(d) 5 B. & Ald. 335.

(e) 2 M. & W. 149.

(g) 3 M. & Selw. 117.

Exch. of Pleas, Law v. Hodson (a), Little v. Poole (b).] [Parke, B.—The
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sole question is, whether the act of Parliament prohibits a transfer of stock in pursuance of that contract, or prohibits an executory contract only.] The question rather is, whether the act of Parliament meant to prohibit the sale and transfer of stock by persons who are not the owners of it; for if the act did so intend, then a transfer under such a contract is illegal. This is a case in which the plaintiff says the defendant was indebted to him for certain stock then sold and transferred to him. It is sold by a party who does not state that he is the owner, and *caused to be* transferred, which seems to assume that he was not the person transferring it; and the plea then states, “that the said stock so caused to be transferred from the plaintiff to the defendant, was so caused to be transferred under and by virtue of a certain contract and agreement made with the plaintiff,” (therefore the plea alleges the transfer to have taken place under that contract), after the day mentioned in the act of Parliament, for the transfer of so much stock in the first count mentioned, “for and in consideration of the sum of 4531*l.* 5*s.* to be therefore paid to the said plaintiff for the same. And the defendant further says, that, at the time of the making of such contract and agreement, the plaintiff was not actually possessed of or entitled unto, in his own name or in the name or names of any trustee or trustees, to his use of the said interest or share in the said stock, or of any part thereof.” The declaration says the defendant is indebted to the plaintiff in a certain sum, “for stock sold and caused to be transferred.” The defendant says, that was done in pursuance of a contract made illegal by act of Parliament. That is the case on which the Court has to decide: and it is submitted, that upon this act of Parliament, if a person enters into a con-

(a) 11 East, 300.

(b) 9 B. & Ch. 192.

tract for the sale of stock of which he is not possessed, and transfers it, such transfer is illegal. [*Alderson*, B.—And the other is to pocket the stock without paying for it?] So he may in all similar cases. The same hardship arose in the cases which have been cited—the vendee had got the coal and burnt it, or ate the provisions; the vendee had the value of the bricks or the books; the coal, or the provisions, or the bricks, or the books, might be worth as much as this stock. Still the same question arises: if the act of Parliament has prohibited the transaction, and the party has knowingly violated that act of Parliament, he cannot come into a Court of justice to enforce the contract. The defendant contends, therefore, that the right construction of this act is, that, although the first seven sections apply to putts and refusals and differences, the sale of stock by a person not the owner of it at the time, is expressly prohibited by the 8th section, and the seller cannot maintain an action for the price of it. [He also cited *Hitchins v. Lander* (a), where a plea of the stat. 32 Hen. 8, c. 9, s. 3, against buying pretended titles, without having been in possession by the space of one whole year, was held a good answer to a bill in equity filed for a discovery.]

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Cresswell, in reply.—This contract is by no means made void by the statute, and even if it were, no case has been cited to shew that, after an actual transfer and acceptance, a new contract would not arise to pay for that stock, although the original contract might have been void, and could not be enforced in a Court of law. Some such case would surely have occurred, if such a construction had ever been put upon these acts of Parliament before. But, looking to these provisions from the beginning, the learned counsel for the defendant is not correct in his view, either of this

(a) *Cooper's Cha. Ca.* 84.

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act or the other acts he has brought before the Court. It will be found that the 10th section of the 8 & 9 Will. 3, c. 32, as well as the earlier part of the 7 Geo. 2, c. 8, relates to contracts in which the party has no interest in the stock whatever. By the 10th section of 8 & 9 Will. 3, c. 32, it is "declared and enacted that every policy, contract, bargain, or agreement, made and entered into, or to be made and entered into by any person or persons whatsoever, upon which any premium already is, or at any time hereafter shall be given or paid, for liberty to put upon &c., any share or interest in any joint stock, &c., other than and except such policies &c., as are to be performed within the space of three days &c., is and shall be utterly null and void to all intents and purposes." What is here prohibited is neither more nor less than a policy of insurance as to the price of stock at a future day. It seems to apply to transactions in which the person insuring may have no interest in and no contract for the stock, except that he undertakes that upon a certain day the stock shall be at a certain price. There are no words relating to any actual transfer of stock as between them; and therefore that statute, and the decisions upon it in Lord *Raymond*, may be entirely laid out of the question, with this observation only, that in both the cases cited, the action was founded upon an executory contract. The 1st section of the 7 Geo. 2, c. 8, will be found to be applicable to transactions of the same nature, upon which a premium of insurance had been paid. The 2nd section applies to a discovery, the 3rd to security for costs, and the 4th to a penalty for making or executing any putts or bargains, again alluding to a premium of insurance; and it will be found that the legislature has not completely prohibited all transactions properly called time bargains—speculations in the funds not to be followed up by real transfer of existing stock—without the 8th section; because in the 5th section the legislature says, "and for preventing

the evil practice of compounding or making up differences for stocks or other securities, bought, sold, or at any time hereafter to be agreed so to be, be it further enacted, &c., that no money or other consideration whatsoever, (except as hereinafter is provided), shall from and after the said 1st day of June, 1734, be voluntarily given, paid, had, or received, for the compounding, satisfying, or making up any difference for not delivering, transferring, having, or receiving any public or joint stock." In order to preclude, as far as they could, these time bargains, which are clearly nominal and not real bargains for the purchase and sale of stock, they provide that no money shall be voluntarily paid, and therefore that the bargain shall be specifically performed. Then the 6th section provides nevertheless, "that no person or persons who shall sell any public or joint stock &c., to be delivered and paid for on a certain day, and which shall be refused or neglected to be paid for according to such agreement, shall be obliged to transfer the same; but it shall and may be lawful for such person or persons to sell such stock, &c., which shall be so refused or neglected to be paid for, to any other person or persons for the best price which can be obtained; and after such sale, to receive (if the parties can agree) or to recover, as aforesaid, from the person or persons who first contracted for the same, all the damage which shall be sustained thereby." It is very true, that Lord *Ellenborough*, in an action brought upon that section (a), where there had been no resale and transfer, says, you cannot ascertain the damage the statute has given you, until you have transferred the stock and got the market price for it. With respect to the notion that the statute was directed to prohibit every thing like speculation in the funds, if the legislature had intended to do this effectually, they must have prohibited all speculations in the funds for the transfer of stock in

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(a) *Heckscher v. Gregory*, 4 East, 607.

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that is just as much a risk. If I sell my stock to-day, and undertake to transfer it in a week, I run the risk of its rising, in which case I lose, and the buyer runs the risk of its falling, in which case he loses. What object could the legislature have in view, in prohibiting a transaction of this nature? in saying that a party shall not contract to sell and transfer that which he really intended to sell and transfer, where in fact it is intended by both parties to be a *bonâ fide* sale and transfer? It is easy to understand an intention to prevent gambling in non-existing stock, where none of the parties may be worth a farthing in the world; where no money is to be paid on the one hand, and no stock to be transferred on the other. What then has the act prohibited? Contracts for differences to be voluntarily paid. It therefore allows an actual sale, and a recovery of the differences upon the actual transfer; and the 8th section was introduced in order to remove all doubt which might exist as to contracts to be made for the sale of stock which neither party contemplated parting with or receiving. The words of the section will fully warrant that construction. It is admitted that the Court ought not to consider the hardship of the case; but it is a first principle in construing all penal acts of Parliament, that you should not impose a penalty but by the clearest possible words: nor will the Court enable a party to retain stock to the value of £5000, unless there is something in the act of Parliament which is clearly imperative upon them. Now, if the Court look at this section, they will see it is nowhere made unlawful *to sell and transfer*. [He then read the first part of the section.] Now a party may contract to buy, not intending to have the transfer; he may contract to sell or assign, not intending to make the transfer; he may contract to transfer, not intending to make a *bonâ fide* sale; but it is nowhere provided, that a contract *bonâ fide* made for the sale and transfer of

stock shall be void, although the party has not the stock at the time in his own name. The true construction is therefore this:—if a person merely enters into a contract for a sale, not to be followed up by an actual transfer, it is void; but if the parties really contract to sell, and it appears, that the transaction is that of an actual sale coupled with an actual transfer—that is a good transfer, and the transferee is bound to pay the price. But it is said that the plaintiff cannot come into Court, and allege that he made the contract for that transfer, in defiance of the act of Parliament. But the cases which have been cited on the other side, and particularly that of *Ribbans v. Crickett* (a), establish incontestibly that a party *may* shew that his contract was made in defiance of an act of Parliament. And the case of *Hitchins v. Lander* is another illustration to refute the doctrine advanced on the other side, that a party cannot set up as a defence to an action his own participation in an illegal transaction; for there the defendant pleaded his own grant of the lease mentioned in the bill praying a discovery, in defiance of the statute of Hen. 8; and that plea was held to be good. If the legislature had intended to make such dealings altogether void, they would have said that any transfer made under such a contract should be void; but the defendant will not argue so, because if the transfer were to be void, as forming part of an illegal transaction, it would prevent him from keeping the stock without making payment for it. But, surely, when the act in the 1st section provides that premiums paid for insurances which are illegal shall be paid back, so with respect to differences paid that they shall be recovered back, would it not have provided that money paid for stock should be paid back; or, in the case of stock transferred under such a bargain, that the transfer should be void, and therefore the stock remain the property of the party transferring?

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It is unnecessary to advert to the case of *Bryan v. Lewis*, because this Court has distinctly decided, that contracts for the sale of goods cannot be considered illegal and void, merely because the party may not have them until after the time of making the contract. Then the case of *Sanders v. Kentish* was endeavoured to be distinguished from the present, on the ground that the plaintiff there had not sold stock but lent it. But what the plaintiff had done had nothing whatever to do with the case; the question was, what the defendants had contracted to do, and whether they were bound to do that which they had contracted to do, if the plaintiff proved a consideration for the defendants' promise. It is true the plaintiff gave stock, with a power of attorney to sell the stock in order that the defendants might receive the proceeds of it, and that was the consideration for a future transfer of stock by the defendants to the plaintiff, of which the defendants were not then possessed. The counsel for the defendants, in argument, certainly endeavoured to take a distinction on the ground of its being a loan of stock; but that distinction can have no bearing upon the construction of the 8th section, for it is expressly stated in the case, "that the defendants, at the time of making the agreement to transfer the stock as aforesaid, were not, nor was either of them possessed of, or entitled to, in their or either of their own name or names, &c. &c., of any such stock as is in the contract or agreement mentioned, or any 4*l.* per cent. annuities whatsoever." Now suppose, instead of being a loan of £3000, 3*l.* per cents. to receive back £3000 4*l.* per cents., it had been a contract that the defendants might take so much 4*l.* per cent. to replace so much 3*l.* per cent. afterwards, surely it could have made no difference for this purpose. [*Alderson*, B.—That decision only goes the length of saying, that the words are to be construed "a contract to transfer under a sale," and that a contract for a transfer to make good a loan is not a contract for a transfer under a sale]. It may

be a contract to replace, not a contract to sell; but it is apprehended that in truth it is a contract to sell. It was clearly not within the terms of the 11th section; it was not a loan of money upon the security of stock, and the stock to be transferred; it was not a mortgage of stock; but it was a power given to turn that stock into money, and to use the money, the defendant agreeing to buy other stock with that money for the purpose of transferring it to the plaintiff in lieu of the other. In *Child v. Morley*, the plaintiff never had any interest in the sale whatever; he was never to sell on his own account: he was merely a broker. It was clear from the case there stated, that Child had no right to pay Morley's debt, and make himself, whether he would or not, his creditor for that amount, and to put that difficulty upon him. The only mode of arguing to shew that Child had a right of action, would be that Child himself was compelled to pay the debt, and therefore might recover over; as was held in *Exall v. Partridge (a)*, where one man, to redeem his goods from distress, paid the debt of another, and it was held he had a right of action. And it is with reference to that argument that Mr. Justice *Lawrence* says—"My difficulty is this, if Child contracted to sell the stock on his own account, then the case falls directly within the prohibition of the act of Parliament, because he really was not so possessed of the stock so bargained and sold." Nor was he to have any actual interest in the contract; it was not his contract; it was Morley's contract with the transferees, and not Child's, and though Child might undertake to make it in his own name, he had no legal authority to do so, nor would the statute enable him to do so; because the only interest he could have in the transfer was the interest in the differences. It is to be observed, however, that no such observation is made by any of the Judges, except Mr. Justice *Lawrence*.

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[He then remarked on the cases of *Law v. Hodson*, *Bensley v. Bignold*, *Ribbans v. Crickett*, *Wilkinson v. Loudonsack*, and *Little v. Poole*, cited by Sir W. Follett, and distinguished them on the ground that those were contracts directly prohibited by law, and therefore illegal and void.]

But suppose the 8th section did relate to contracts of this description, and that no action could be maintained for the breach of such a contract, still an action would lie for the price of the stock when transferred. The statute nowhere says that the transfer of stock, made in pursuance of such a contract, is to be void or illegal; the policy of the act does not seem to extend to it. It may be very true, as is contended on the other side, and as is alleged in the plea and admitted by the demurrer, that the stock was transferred in pursuance of that original contract; but if the act done in pursuance of that contract is itself a legal act, there is nothing to make such transfer illegal. No principle or decision has been adduced for such a position. There is no equity in it. If I make a contract which in itself is contrary to the act, to transfer stock; but, having made that contract, I do that which is in itself a lawful act, at the request of the party, and he avails himself of it, and the thing is transferred under the sale, how can he say the law does not imply a promise to pay for it? Suppose the contract to be void, still the price is ascertained; the seller, at the request of the purchaser, makes the transfer, which is legal, and having done that, why is he not to be paid for it? The case is distinguishable from all those cases which have been so much relied upon, because there the very act was illegal; here there is nothing to shew that the transfer was illegal, and therefore the plaintiff must be entitled to recover. As an instance of the application of such a principle, the Ship Registry Act may be referred to. Formerly that Act, (the 34 Geo. 3, c. 68, s. 14) prescribed that no transfer, contract or agreement for transfer, of property in a vessel, should be valid, unless the transfer, or contract

for transfer, contained a recital of the certificate of registry. Suppose that had been limited to the *contract*,—that no contract should be valid without such recital, but that it should be void to all intents and purposes; and that, the contract having been made without that recital, a bill of sale had afterwards been executed, transferring the ship from one owner to the others; could it be said the seller was not to recover the value of the ship? According to the argument on the other side, he could not. The agreement in the first instance could not be enforced; but if afterwards the parties do that which is a legal act, neither *malum in se*, nor *malum prohibitum*, surely the party transferring is entitled to recover. If indeed the sale were made void, unless the certificate were recited in the bill of sale, then the parties are put in *statu quo*; the one takes back the ship, and the other his money:—but here the defendant wishes to keep the stock without paying for it. It is apprehended, however, that no mischief can arise in applying this act of Parliament to sales of non-existing stock only, and that the plaintiff is, on that ground also, entitled to recover.

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PARKE, B. now said :—In the case of *Mortimer v. M'Callan*, which was very fully and ably argued by Sir *William Follett* and Mr. *Cresswell* last term, we have taken time to consider; and as we find that the very point was decided upon the motion for a new trial, we think we are bound to adhere to that decision, whatever doubts as to the propriety of some part of it may exist in the minds of some members of the Court.

Judgment for the plaintiff.

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Where the plaintiff, being the owner of a woollen mill and steam-engine, let to the defendant a room in the mill, together with a supply of power from the steam-engine by means of a revolving shaft in the room:—
Held, in an action for double value, under stat. 4 Geo. 2, c. 28, against the tenant for holding over after the expiration of a notice to quit, that in estimating such double value, the value of the power supplied could not be included.

THIS was an action of debt, on the statute 4 Geo. 2, c. 28, for the recovery of double the annual value of a woollen-mill and premises, situate at Huddersfield, brought by the plaintiff as the owner against the defendant as the tenant of the premises, for holding over six months after the expiration of a notice to quit.

At the trial before *Coleridge*, J. at the last York Assizes, it was proved that the mill and premises, including a steam-engine therein, were the property of the plaintiff; that the plaintiff, in the year 1830, let to the defendant a room in the mill, together with a supply of power from the steam-engine by means of a shaft revolving in the room, the amount of rent to be regulated by the amount of machinery which the defendant should from time to time introduce into and require to be worked in the mill. The rent varied in amount until the year 1835, since which time it had invariably continued at the sum of £451; and it was proved that the defendant had, in various notes and figures in his own handwriting, debited himself with the half-year's rent in one entire sum of £225 10s. The custom of the trade appeared to be for the owner of a mill to fit up the steam-engine, and supply the power or first motion, and then to let it to his tenants at one entire sum. The counsel for the defendant contended, that as the statute only gave double value for "lands, tenements, and hereditaments," the value of the power supplied by the steam-engine did not come within the meaning of those words, and that the verdict ought to be reduced to such a sum as should be shewn to be double value of the room above, when severed from the steam power. The learned Judge, however, was of opinion that they could not be separated, as they were let together, as in the case of a furnished dwelling-house: but gave the defendant leave to

reduce the damages by such sum as the value of the steam power should be ascertained to be, in case the Court should be of opinion that the plaintiff was entitled to recover double the value of the room only; it being agreed that the amount should be left to the decision of an arbitrator. *Dundas* having, in Easter Term last, obtained a rule accordingly,

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Cresswell (*Knowles* was with him), now shewed cause.—The defendant, by taking the room and the engine power, had the benefit of the latter; and by holding over he prevents the landlord from getting the value from some other tenant, and therefore the plaintiff is entitled to recover double the value of the whole under the statute. The statute meant to give the landlord double the value of that which was withheld from him by his tenant. If the tenant had given the notice, the landlord would clearly have been entitled to double rent under the 11 Geo. 2, c. 19, s. 18. [*Parke*, B.—Might not the landlord have cut off the shaft communicating with the room?] It appears to have been a horizontal shaft, to which the gearing is attached, and that could not have been done without injuring the occupiers of the other rooms in the mill. It is true the plaintiff was the occupier of the other rooms, but that makes no material difference; it does not lie in the defendant's mouth to say,—“True, I have continued in the possession of this power, but you might have prevented me by cutting off the shaft.” The question is, what the defendant continued wrongfully to occupy and hold over. Suppose the case of a tenant of a ready-furnished house; could it be said that the tenant was not to pay double the value of it as such, because the landlord had power to enter and take away the furniture? Would not the defendant be liable to be rated for this power? It has been so held in the case of a weighing-machine. [*Parke*, B.—Suppose it

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had been a mill worked by a horse ; could you recover for the use of the horse?] Perhaps not. In *Rex v. Bradford (a)*, a canteen in barracks was demised to B. by the barrack-board for a year, at a rent of £15 for the canteen and buildings, and also the further sum of £510 for the privilege of using the same as a canteen, and selling therein provisions and liquors, &c., usually sold by suttlers, with power of distress for the aggregate sum ; and this was held to be one entire rent for the canteen, and therefore that B. was rateable to the relief of the poor as occupier of the canteen, in respect of the £525 aggregate rent, and not merely in respect of the £15. In that case the lessors had actually reserved two distinct rents ; but Lord *Ellenborough*, after saying that he could not look at the reservation in any other view than as a mode of dividing the rents, adds,—“It does appear to me that this is as much a profit appurtenant to the tenement, arising from its local situation, as was the profit of the weighing or carding machine to the tenements there rated. And it has not been improperly likened to the case of a soke mill, which is let at a higher rent, because it has a right to the sole multure of all the corn and grain in the neighbourhood. Can it be doubted that this would form a part of the rateable value of the mill itself?” This room is scarcely of any value without the power being applied to it. The question is, what does the tenant prevent the landlord from enjoying? It is not for the tenant who has held it, to say, You might have taken a step to prevent me from enjoying it. Suppose this had been a small tenement, of which the landlord might have got possession through the intervention of a magistrate, the tenant could not be allowed to say that the landlord was not entitled to double value, because he did not adopt that measure. [*Alderson*, B.—The landlord might be a great

(a) 4 M. & Selw. 317.

loser if he could not recover in this way, but he might still recover the single value. *Parke, B.*—He might recover what he has lost in an action on the case; but the question is, whether he can recover under the words “double the value of the lands, tenements, and hereditaments so detained,” in the statute.] That which is to be recovered must surely be double the value of that which is withheld.

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Dundas and ——— contra.—The landlord is not without remedy, as he might recover any damage actually sustained by an action on the case. But he cannot claim double value under 4 Geo. 2, c. 28. Lord *Ellenborough*, in *Lloyd v. Rosbee (a)*, says:—“This is a penal statute, and is to be construed strictly.” There is a distinction between the two statutes: in the statute where double rent is given, the party is called a tenant; in this he is treated as a trespasser. The same distinction is pointed out by the Court in *Soulsby v. Neving (b)*. Here the landlord puts the tenant into possession of this power, and continues to supply him with it after notice to quit; he thus knowingly enables him to commit the wrong; he cannot afterwards sue him for the penalty. Such power is not “lands, tenements, or hereditaments.” In *Newman v. Anderton (c)*, where it was held that a landlord had a right to distrain for the rent of ready-furnished lodgings, *Mansfield, C. J.* says,—“It must occur constantly, that the value of demised premises is increased by the goods upon the premises, and yet the rent reserved still continues to issue out of the house or land, and not out of the goods; for rent cannot issue out of goods. In *Spencer’s case*, 5 Co. 17, it is resolved, that if a man lease sheep or other stock of cattle, or any other personal goods, for any time, and the lessee covenants for him and his assigns at the end of the time to deliver the like cattle or

(a) 2 Camp. 453. (b) 9 East, 313. (c) 2 N R. 224.

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goods as good as the things letten were, or such price for them, and the lessee assigns the sheep over, this covenant shall not bind the assignee; for it is but a personal contract: and it is added, 'the same law, if a man demises a house and land for years, with a stock or sum of money, rendering rent, and the lessee covenants for him, his executors, administrators, and assigns, to deliver the stock or sum of money at the end of the term; yet the assignee shall not be charged with this covenant, for although the rent reserved was increased in respect to the stock or sum, yet the rent did not issue out of the stock or sum, but out of the land only.' Where land is leased with stock upon it, the rent still continues to issue out of the land only." The stock itself is no part of the value of the subject of occupation.

In *Rex v. The Inhabitants of Mellor* (a), where power was supplied, and there was a contract for a standing-place in another's mill for a carding-machine, (the party's own property), which was fastened to the floor and the roof, for the purpose of being worked by the steam-engine of the mill: it was held not to be a taking of a tenement, but a mere license to use the machinery of the mill, and that no settlement could be derived under it. [*Alderson*, B.—That turned upon his not being in possession of the room; there the miller was in possession of the room.] In *Rex v. The Inhabitants of Seacroft* (b), where a person engaged himself as a waiter at an hotel, and had the tap, or privilege of selling malt liquors there, and the use of the cellar for holding the liquors, which had a separate entrance, and of which he kept the key, and paid for his situation of waiter and the tap and cellar the yearly sum of £60; it was held that that was not such an occupation of the cellar as to confer a settlement. [*Alderson*, B.—The Court there said there did not appear to be any taking of the cellar as a tenant, but the use of it was only a privilege allowed him

(a) 2 East, 188.

(b) 2 M. & Selw. 472.

in respect of the hiring himself as a waiter.] Here the plaintiff might have stopped the power; he has no right to supply it *de die in diem* to a trespasser, and afterwards, to recover double value under the statute, to indemnify himself for the wrong he has himself enabled such trespasser to commit. [Alderson, B.—In *Rex v. Whitechapel* (a), it was held, that, where the sessions find that the amount of the rent paid is more than £10 per annum, the Court will conclude that the tenement is of that value, although it is stated that some personal chattels were likewise demised, unless the value at which they are rented is expressly stated. That seems to imply that if the value had been found, they would have deducted that amount. Parke, B.—The criterion seems to be, whether this could be recovered in the shape of rent by distress.]

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The judgment of the Court was now delivered by

PARKE, B.—The question in this case is, whether, in estimating the double value of a room in a factory, held over by the defendant, the value of the power of a steam-engine, which was supplied by the landlord to turn the machinery in that room by means of a shaft revolving in it, can be included. We think it cannot. By the express terms of the statute, the tenant holding over is to pay at the rate of double the yearly value of the *lands, tenements, and hereditaments* so detained. The value of the soil itself, and every thing which, by having been attached to it, becomes part of the soil, is no doubt to be estimated for this purpose, as well as that of all easements, rights, and appurtenances thereto belonging, or enjoyed therewith; and that value is what an occupier would give, and the landlord would otherwise have received, for the use of the freehold and every thing connected with it, during the time that the

(a) 2 Bott, 102, pl. 146; 2 Nolan, 37.

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possession is withheld. But where a compensation is paid jointly for the use of the tenement and its appurtenances, and for something else, as, for instance, for the landlord's performance of a contract to do something which would be beneficial to the occupier; the compensation so paid, though an entire sum, is not entirely for the value of the occupation, though by the contract of the parties the portion applicable to each is not ascertained. If, by the contract of the parties, a separate sum was fixed as a compensation for each subject, there would be no difficulty in the case; and the omission to make that apportionment, in truth, makes no other difference than that it renders it less easy to ascertain the value of each part.

If a landlord demises a public-house at rack-rent, and contracts to supply it with specified quantities of ale, which the tenant agrees to take at reasonable or fixed prices, the landlord is paid the value of the house in the shape of rent; and the compensation for the supply of ale, in the shape of profit on each transaction. It could not be contended, that the amount of both together was the value of the house; nor would it make any difference if the tenant had agreed to pay for both by one fixed sum. In like manner, if the landlord agrees to supply the tenant with horses, to be used on or off the tenement as a moving power, or with steam for the like purpose, whether at separate sums for each, or one sum for both, the compensation for the power can in neither case form a part of the value of the subject of the occupation. If the landlord, by means of the tenant having held over, is prevented from using his power beneficially, and deprived of profit thereby, he has a remedy on his contract with the tenant, to give up at the end of the term, or for a trespass in continuing to occupy, and may recover a compensation for his loss by way of special damage. But on the statute, which is penal, and is to be construed strictly, he can only recover double the value of the occupation of the tenement

and its appurtenances. The rule must therefore be absolute.

Rule absolute.

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ASSUMPSIT for the breach of a promise to marry the plaintiff in a reasonable time. The declaration was in the usual form, alleging mutual promises to marry. Plea, that after the making of the promise in the declaration mentioned, and before any breach thereof by the defendant, to wit on &c., the plaintiff wholly absolved, exonerated, and discharged the defendant from his promise and the performance of the same. Verification.

To a declaration in assumpsit founded on mutual promises to marry within a reasonable time, it is a good plea, that after the promise, and before any breach thereof, the plaintiff absolved, exonerated, and discharged the defendant from his promise, and the performances thereof.

Special demurrer, assigning for causes, that the plea consists wholly of matter of law, on which no assumpsit nor material issue can be taken; that the facts which constitute the discharge alleged by the defendant ought to have been set out, in order that the judgment of the Court might have been taken as to their constituting such discharge or not, or otherwise that issue might have been taken on some material fact so alleged; and that the allegations in the plea are much too general, and therefore no traverse can be safely taken, so as to bring any distinct matter of fact in issue, &c.—Joinder in demurrer.

The following points of argument were stated in the margin:—The plaintiff will contend that a contract founded on mutual promises can only be rescinded before breach by mutual consent; and that a mere discharge by one of the parties, without any act of the other party, is incomplete. The defendant will contend that a promise may be discharged by parol before breach, and that it is not necessary in pleading to state the evidence of such discharge, or the special circumstances under which it arises, or that there was any consideration for the same.

The case was argued in Trinity Term, by

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E. Perry, in support of the demurrer.—This plea may be proved in many different ways, and the plaintiff is left entirely in the dark as to what is the real ground of defence. [*Alderson*, B.—There is no allegation that the defendant agreed to the discharge.] The Court then called on

Montague Smith, in support of the plea.—The plea is not pleaded as a *rescission* of the contract: but the plaintiff cannot enforce an action against the defendant, after she has dispensed with the performance of it. There are many cases in which a party is debarred from maintaining an action by a certain act or declaration of his own. [*Alderson*, B.—How can there be a dispensation before breach?] It is a kind of leave and license not to perform the contract. [*Alderson*, B.—Does the contract cease or continue? If it ceases, it is rescinded; if it continues, there may be a breach of it.] *Langden v. Stokes* (a) is an authority for the defendant. There the plaintiff declared in assumpsit, that whereas the defendant on the 2nd of April, and for such a valuable consideration, assumed to go such a voyage in such a ship before the August following, and alleged a breach in the non-performance. The defendant pleaded, that before any breach, the plaintiff, on the 4th of April, at such a place, *exoneravit eum* of the said promise; and on demurrer the plea was held good, on the ground that as this was a promise by words, it might be discharged by words before breach; “*eodem modo quo oritur, eodem modo dissolvitur.*” There, no more consideration was shewn for the discharge of the defendant from his promise, than there is here. So in Com. Dig., Action upon the Case upon Assumpsit, G, it is said—“if a man make a promise, he to whom it was made, before a breach may discharge it by parol:” citing *Treswaller v. Keyne* (b), and several other

(a) Cro. Car. 383.

(b) Cro. Jac. 620.

authorities. Many instances might be put, in which a party debars himself from bringing an action against another; as by giving another leave to go over his ground; or by the gift of a horse, lent for a specific time, before that time is over; yet in such cases there is no consideration for so doing. Before breach, it is a sort of license, which may be without consideration. It is a maxim of law, that *ex nudo pacto non oritur actio*—but a party may *debar himself* of an action without consideration. After breach, no doubt, nothing is sufficient but accord and satisfaction. [Alderson, B.—The case of *Langden v. Stokes* certainly appears to be directly in point.]

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E. Perry.—The pleadings are not fully set out in that case, and it is quite consistent with all that appears in the report, that the plea may have shewn an agreement, and a mutual exoneration of each party by the other. The rule of the civil law there referred to is this:—"Nihil tam naturale est, quam eo genere quidque dissolvere, quo colligatum est: ideo verborum obligatio verbis tollitur: nudi consensûs obligatio *contrario consensu* dissolvitur (a). So, also, Pothier states the rule of the civil law:—"With respect to those obligations contracted by the consent of the parties, the release might be made by a *simple agreement*, by which the creditor agreed with the debtor to hold him acquitted, and such agreement extinguished the obligation pleno jure (b)." In *Treswaller v. Keyne*, which was assumpsit on a promise by the defendant to pay the plaintiff £4, in consideration that the plaintiff would travel with him from London to York, to help him to search for a will; the plea stated that, after the promise, and before any preparation made for the journey, it was *accorded and agreed between them* that the plaintiff should forbear his journey, and that the defendant should be discharged from the pay-

(a) Dig. xvii. 35.

(b) Pothier on Obligations, Part iii. ch. 3, art. 1.

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ment of the £4, and that accordingly he discharged the plaintiff of his journey and search. However, that case was decided for the plaintiff on another point. So, in *Hurford v. Pyle* (a), it was held that a contract founded on mutual promises could not be discharged but with consent of both parties. Where the consideration for the promise is *executed*, but something remains to be done by one party, there a discharge by the other before breach may be a discharge in toto; but where it is a contract founded on mutual promises, it can be discharged only by mutual consent, and the plea of *exoneravit eum* does not apply to such a case. On this principle rest the decisions in *Leigh v. Paterson* (b) and *Phillpotts v. Evans* (c), where it was held that a contract to deliver goods on a certain day cannot be got rid of by a notice from the seller, before that day, that he shall not deliver the goods, unless it be assented to by the buyer.

M. Smith referred to *Edwards v. Weeks* (d).

Cur. adv. vult.

The judgment of the Court was now delivered by

ALDERSON, B.—In this case we are of opinion that the plea is good, and that the demurrer must be overruled.

The question before the Court was this:—Whether, to an action founded on mutual promises to marry within a reasonable time, the defendant could plead that, before any breach of contract on his part, the plaintiff wholly exonerated him from the performance of that contract. And it was contended that the proper plea was, that before breach, the plaintiff and defendant by mutual agreement

(a) Cro. Jac. 483.

(c) 5 M. & W. 475.

(b) 2 Moore, 588.

(d) 1 Mod. 262; 2 Mod. 259.

had rescinded the contract previously made between them. No doubt such a plea would be good; but on looking into the precedents to which we have been referred, we find that the form of the present plea has been adopted and held good in several cases. There are precedents in several of the books of entries (*a*), and there are two decided authorities, *Holland and Conier's case* (*b*), and *Langden v. Stokes* (*c*). And we think this latter case explains the matter, and reconciles the present plea with general principles. It seems to have been treated there as a mere question of the form of plea—and so we think it is: for, although we are of opinion that this plea is good in point of form; yet we think the defendant will not be able to succeed upon it at *Nisi Prius*, in case issue be taken upon it, unless he proves a proposition to exonerate on the part of the plaintiff, acceded to by himself; and this in effect will be a rescinding of the contract previously made.

We think, therefore, that judgment must be given for the defendant; but the plaintiff should have liberty to amend on payment of costs.

Leave to amend accordingly.

(*a*) *Rast. Entr.*, 685; *Brown's Entr.* 67 (fol. edit.); *Hern's Pleader*, 31.
 (*b*) 2 *Leon.* 214.
 (*c*) *Cro. Car.* 383.

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Bragg and Another v. RYLAND.

THE following case was stated under a Judge's order, by consent of the parties, for the opinion of this Court.

one half of his property at his decease, whether in houses, lands, or other effects, to be equally divided among them and their heirs, according to the judgment of his executors, whom he empowered to sell or dispose of the whole or any part, according to their opinion, for the benefit of his children, as they severally arrived at the age of twenty-five, and not before, unless his executors should think it prudent to divide it before. The testator then gave the remaining half of his property to his wife for her life, and to leave it at her death by her will among his children; but if she made no will, then to be equally divided among his children and their heirs:—*Held*, that the power of sale given to the executors extended only to the moiety first devised among the children and their heirs.

A testator devised among his children (naming them),

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The plaintiffs are the executors of the will of Sampson Tomlinson, deceased, who, at the date of his will herein-after set forth and at the time of his death, was seised in fee-simple in possession of a close or piece of land, situate in the parish of Ashton, in the county of Warwick. The said Sampson Tomlinson, by his last will and testament, bearing date the 23rd of December, 1822, properly executed and attested for the passing of real estates (after some bequests not material to this case), devised as follows :—"And I give among my children Sampson, Mary, and James, one half of my property, whatever it may be, at my decease, and in whatever it may consist, whether in houses, lands, or other effects, and whether freehold or leasehold, to be equally divided among them and their heirs, according to the judgment of my executors herein-after named, whom I empower to sell or dispose of the whole or any part, according to their opinion, for the benefit of my said children, as they severally arrive at the age of twenty-five, and not before, unless my executors think it prudent to divide it before; in which case they are hereby empowered to give it them after they arrive at the age of twenty-one years, and not before : And I declare, in case of sale, their receipt shall be effectual discharges to the purchasers for their purchase-money." The will then contained some further bequests of personalty, and then proceeded :—"The remaining half of my property, as above described, I leave to my wife Martha, during her natural life, and to leave it at her death by will among my three children, in such proportions as she shall think proper; but if she does not make her will, then to be equally divided among my three children, and their heirs. I also desire that the half of my daughter's fortune, of which my wife has the power to dispose, may, if my wife shall not give any directions respecting it, be settled upon her during her life; and to be equally divided amongst her children, and their heirs and executors, at her decease,

without any influence over it by her husband, if she should marry. And as my son Sampson does not very well comprehend conversation, and is also imperfect in speech, I wish my executors to settle two-thirds of his fortune upon him during his life, and to be equally divided amongst his children, or their heirs and executors at his death."

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The testator then appointed the plaintiffs executors of his said will, and afterwards died without making any alteration in the above devise, and the will was duly proved by the plaintiffs. Mrs. Tomlinson, named in the will, afterwards died without making any appointment of any part of the property in question. The plaintiffs, becoming desirous of selling the whole of the close or piece of land hereinbefore mentioned, on the 2nd day of December, 1839, entered into the agreement with the defendant upon which this action is brought, whereby they agreed to sell and convey the fee-simple of the whole of such land to the defendant for the sum of £1000, and to produce a good and marketable title to the same.

The defendant, after perusing the abstract of the plaintiff's title, refused to complete the purchase, on the ground, that the power of sale given by the will of the said Sampson Tomlinson to his executors extended only to a moiety of the lands devised by the will, and that therefore no valid and marketable title could be made by the plaintiffs under such power of sale to the whole of the close or piece of land comprised in the contract of sale.

The plaintiffs, on the other hand, contend, that upon the true construction of the whole of the will, with reference to the objects which the testator appears to have had in view, the power of sale must be considered to extend to the entire estate devised by the will, and not to a moiety of it only. And the plaintiffs accordingly offered to convey the whole of the close or piece of land in question to the defendant under the above power of sale, but the defendant declined to complete the purchase upon those terms.

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The question for the opinion of the Court is, whether the plaintiffs, as executors of the will of the late Mr. Tomlinson, can convey to the defendant a valid title to the whole of the said close or piece of land comprised in the contract of sale. If the Court should be of opinion that the plaintiffs can convey such a title to the same, judgment is to be entered for the plaintiffs by confession, for the sum of £—; if otherwise, a judgment of *nolle prosequi* is to be entered.

The case was argued at the present sittings, by *Cowling* for the plaintiffs, who contended that the power of sale was clearly intended to extend to the entire property devised, all of which was ultimately to be equally divided among the testator's children or their representatives; and by *Goulburn*, Serjt., for the defendant, who argued that it was confined to the moiety first given to be divided by the executors among the children, and to be sold according to their opinion for the benefit of the children, on their arriving at the specified ages.

The Court took time to consider, and on a subsequent day the judgment of the Court was delivered by

PARKE, B.—The question in this case was, whether the executors named in the will of Sampson Tomlinson had a power of sale over the whole of the property or not. We have had considerable doubt upon it, but have come to the conclusion, after consideration, that they had not. The words of the will should be construed according to their ordinary import: and we think the natural meaning of the words by which the power is given, in the place in which they occur in the will, is to give the executors power to sell only that half of the property which is given directly to the children. The words are—"whom I empower to sell or dispose of *the whole or any part*"—If the will had stopped there, it might well be said that the power extended to all the property; but it goes on—and we must read all the words together—"ac-

according to their opinion, for the benefit of the said children, as they severally arrive at the age of twenty-five," &c. We think, therefore, that the testator must have meant to include in the power the whole of that half of his property only which he had given to his children, and that consequently there must be

Judgment for the defendant.

WICKHAM v. HAWKER and Others.

TRESPASS for breaking and entering several closes of the plaintiff, and with horses and dogs hunting and searching therein for game, &c. and seizing, taking, and carrying away game being in and upon the said closes, &c.

Pleas, 1st, not guilty; 2ndly, that long before the several times when &c., and before the plaintiff had any title or interest in the said closes, to wit, on the 14th October, 1712, Stephen Vidler and Richard Cox were seised in their demesne as of fee of and in the manor of Bullington, with the appurtenances, in the county of Southampton, in trust for one Richard Widmore: and being so seised, the said Richard Widmore, Stephen Vidler, and Richard Cox, by a certain indenture then made between them of the one part, and one John Wade of the other part, [profert], did, according to their several estates and interests, release and convey unto the said John Wade, his heirs and assigns for ever, certain premises situate in East Bullington in the said county, then being in the actual possession of the said John Wade, by virtue of a lease thereof for one year theretofore made to him by the said R. Widmore, S. Vidler, and R. Cox, which said last-mentioned premises had been and were, before and at upon lands, and there to hawk, hunt, fish, and fowl," is a grant of a *license of profit*, and not of a mere *personal license of pleasure*; and therefore it authorizes the grantee, his heirs and assigns, to hawk, hunt, &c., by his servants in his absence.

Such a liberty is, therefore, a *profit à prendre*, within the Prescription Act, 2 & 3 Will. 4, c. 71, s. 2.

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By deed, A. and B. conveyed to D. and his heirs certain lands, excepting and reserving to A. B. & C., their heirs and assigns, liberty to come into and upon the lands, and there to hawk, hunt, fish, and fowl:—
Held, that this was not in law a reservation properly so called, but a new grant by D. (who executed the deed), of the liberty therein mentioned: and therefore that it might enure in favour of C. and his heirs, although he was not a party to the deed.

The grant to a person, his heirs and assigns, of "free liberty, with servants or otherwise, to come into and

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the time of making the said indenture, part and parcel of the demesne of the said manor, and of which said last-mentioned premises so released and conveyed as aforesaid, the said closes in which &c., in the said declaration mentioned, then were and still are part and parcel; *excepting and always reserving out of the said release and conveyance, unto the said R. Widmore, S. Vidler, and R. Cox, their heirs and assigns, free liberty, with servants or otherwise, to come into and upon the said last-mentioned premises so released and conveyed as aforesaid, or any part thereof, and there to hawk, hunt, fish, and fowl, at any time thereafter, at the will and pleasure of the said R. Widmore, S. Vidler, and R. Cox, their heirs and assigns, or any or either of them, without any let or contradiction of the said John Wade, his heirs and assigns: and the said John Wade did thereby, in and by the same indenture, grant unto the said R. Widmore, S. Vidler, and R. Cox, their heirs and assigns, the said liberty so mentioned therein to be excepted and reserved as aforesaid; as by the indenture fully appears: whereupon and whereby, the said R. Widmore, S. Vidler, and R. Cox, became and were seised as of fee and right of and in the said liberty, by the said indenture so granted to them as aforesaid. And the defendants further say, that after the making of the said indenture, and while the said S. Vidler and R. Cox were seised of and in the said manor with the appurtenances as aforesaid, and while the said R. Widmore, S. Vidler, and R. Cox were so seised of and in the said liberty, to wit, on the 1st day of December, A. D. 1713, the said S. Vidler and R. Cox, by indenture under their hands and seals, which said last-mentioned indenture having been by accident lost, the defendants cannot produce the same to the Court here, released and conveyed unto the said R. Widmore, his heirs and assigns for ever, the said manor with the appurtenances, then being in the actual possession of the said R. Widmore, by virtue of a lease thereof for one year,*

theretofore made to him by the said S. Vidler and R. Cox ; and in and by the said last-mentioned indenture demised, released, and for ever quit-claimed to the said R. Widmore, his heirs and assigns for ever, all the right, title, and interest of the said S. Vidler and R. Cox, of and in the said liberty so expressed to be excepted and reserved, and so granted in and by the said indenture first above mentioned as aforesaid ; whereupon and whereby the said R. Widmore then became and was solely seised in his demesne as of fee, and of and in the said manor, with the appurtenances, and solely seised as of fee and right of and in the said liberty : and the said R. Widmore being so seised, afterwards, to wit, on the 1st day of January, 1720, died so seised of and in the said manor with the appurtenances, and liberty aforesaid. [The plea then proceeded to deduce the title to the manor and liberty from Widmore to the defendant Col. Hawker, and concluded as follows:—] Wherefore the defendant Peter Hawker in his own right, and the other defendants as his servants, and in his company, and by his command, at the said several times when, &c. broke and entered the said closes in which, &c. in the declaration mentioned, for the purpose of using and exercising the said liberty ; and for that purpose, and upon those occasions, with the horses, dogs, and guns in the said declaration mentioned, being the horses, dogs, and guns of the defendant Peter Hawker, hunted and searched in the said closes for the game in the said declaration specified, and killed, seized, took, and carried away the hares, pheasants, &c. therein mentioned, and converted and disposed thereof to the use of the said Peter Hawker, &c. &c. as they lawfully might for the cause aforesaid, which are the said supposed trespasses, &c. Verification.

Third plea, that the defendant Peter Hawker, long before and at the said several times when &c., was and still is the lawful possessor and occupier of a certain manor called the manor of Bullington, in the county of South-

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ampton, and that the occupiers for the time being of the said manor now have, and for and during the full period of sixty years next before the commencement of this suit, have of right had and enjoyed, without interruption, and been used and accustomed to have and enjoy, and of right ought to have had and enjoyed, and the defendant Peter Hawker, as such occupier of the said manor as aforesaid, of right ought to have had and enjoyed, and still of right ought to have and enjoy, the free liberty and privilege, with servants or otherwise, to come into the said several closes, or any part thereof, and there to hawk, hunt, fish, and fowl, at any time, at his and their free will and pleasure: Wherefore the defendant Peter Hawker, being such possessor and occupier of the said manor as aforesaid, and the said other defendants as his servants, and in his company, and by his command, &c. &c. [justifying the trespasses as before.]

The plaintiff joined issue on the first plea; and replied to the second, that the said John Wade did not, in or by the said indenture in the plea in that behalf mentioned, grant unto the said R. Widmore, S. Vidler, and R. Cox, their heirs and assigns, the said liberty in that plea mentioned to be excepted and reserved, in manner and form as in the said plea alleged: and to the third plea the plaintiff replied, traversing the right as alleged: on which replications issues were joined. The plaintiff also new assigned to the second and last pleas, that he issued his writ &c., not only for the trespasses in those pleas attempted to be justified, but also for that the defendants Heath and Ralph, as such servants of the said Peter Hawker as in those pleas mentioned, at other and different times than those in the said pleas respectively mentioned, and therein respectively attempted to be justified, broke and entered, &c. the said several closes in the declaration mentioned, &c. &c., the said Peter Hawker not being in fact present or in company with the said two other de-

defendants on any of the occasions or times in this new assignment mentioned: which are other and different trespasses, &c. &c.

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To this new assignment the defendants pleaded, first, a plea setting forth the same title as in the second plea to the declaration, but concluding thus:—Wherefore the defendants Charles Heath and Charles Ralph, as servants of the defendant Peter Hawker, and by his command, and for his use and benefit, on the said several occasions and times in the said times in the said new assignment mentioned, broke and entered the said closes in which &c., for the purpose of using and exercising the said liberty, and for that purpose and upon those occasions committed the said several supposed trespasses by the plaintiff above newly assigned, as they lawfully might for the cause aforesaid, which are the same supposed trespasses whereof the plaintiff has above in his new assignment complained, &c.

The defendants pleaded to the new assignment, secondly, a plea in the same terms as the third plea to the declaration, except that they alleged the trespasses to have been committed by the defendant Hawker, as such possessor and occupier of the manor as aforesaid, and by the other defendants as his servants and by his command, and for his use and benefit, although not in his actual presence or company.

The replications to these pleas respectively traversed the grant by Wade of the liberty of sporting, and the right claimed in respect of the manor, in the same manner as the replications to the second and third pleas to the declaration: and thereupon issues were joined.

The cause was tried before *Coleridge, J.*, at the Hampshire Summer Assizes, 1839. The deed of 1712 was put in, and evidence was given on the part of the defendant, to shew that the defendant Col. Hawker, as owner of Bullington, and his predecessors in estate, and their gamekeepers, had for upwards of sixty years past shot over the lands

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in question. Several deputations of gamekeepers were produced, which described the parties by whom they were appointed as lords of the manor. For the plaintiff it was contended, that the reservation in the deed of 1712 did not operate to vest in Widmore, Vidler, and Cox, the liberty therein mentioned, inasmuch as one of them, Widmore, was no party to the deed : or if it did, that the words of the reservation, "to themselves, and their heirs and assigns, liberty, *with servants or otherwise*," &c., did not authorize the grantees to send their servants to sport in their absence. And with regard to the issues on the sixty years' right, that the right claimed was a mere license of pleasure, and not a profit à prendre, and therefore could not be annexed to a manor, and was not within the operation of the Prescription Act, 2 & 3 Will. 4, c. 71. The learned Judge left it to the jury to say whether, *de facto*, the defendant Hawker, and those whom he represented, as owners of Bullington, had for sixty years exercised the rights set up in the third plea to the declaration and second plea to the new assignment ; *i. e.*, had they sported, &c., *as of right*, whether well founded or not, or had they done so only by permission ? The jury found that Col. Hawker, and those whom he represented, had *de facto* exercised as of right, for sixty years, the right to sport on the plaintiff's lands by themselves and their servants, but not by their servants without themselves (a). The learned Judge thereupon directed the verdict to be entered for the plaintiff on all the issues (except that on the plea of not guilty), giving the defendants leave to move, on the construction and effect of the deed of 1712, to enter a verdict for them on the first special plea to the declaration, and the first plea to the new assignment ; and also to enter a verdict for the defendants on the other special pleas, if the Court should think they ought to be so found.

(a) This was the statement in the report of the learned judge ; the counsel on either side differed as to the terms in which the case was left to the jury.

In Michaelmas Term, *Erle* moved accordingly; citing *Doe d. Douglas v. Lock* (a) as an authority to shew that a reservation and exception (so called) in a lease, of the liberty of hawking, hunting, fishing, and fowling, is not legally a *reservation* or exception, but a *privilege granted* to the lessor; and therefore, that the grant of such a privilege by Wade, in the deed of 1712, might enure to all the three grantees, though one of them was not a conveying party to the deed. As to the other issues, he contended that it was clear, upon the authorities, that a liberty to enter and hunt with servants or otherwise, as it implied a right to carry away the game taken, was a *profit à prendre*, and not a mere license.—A rule having been granted, at the sittings after Hilary Term,

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Rawlinson (with whom was *Butt*) shewed cause.—The deed of 1712, as set out on the record, shewed that Widmore was a perfect stranger to the estate, to whom there could be no *reservation*: and there is not on the face of the deed any absolute *grant* of the liberty or privilege, but a reservation only. The words of the deed are—“*Excepting and always reserving out of the said release and conveyance unto the said Widmore, Vidler, and Cox, their heirs and assigns, free liberty, with servants or otherwise, to come into and upon the premises so released and conveyed as aforesaid, or any part thereof, and there to hawk, hunt, fish, and fowl at any time thereafter,*” &c. In *Cheltham v. Williamson* (b), A. being mortgagee in fee of lands, and B., the mortgagor, entitled to the equity of redemption, by lease and release, A. conveyed, and B. released the lands to C. in fee, who thereby covenanted with and granted to B. that it should be lawful for B., his heirs and assigns, at all times to enter on the lands to search and dig for coal, and to take and carry away the same to his and their own use. It was held that this was only a license, and convey-

(a) 2 Ad. & Ell. 705, 743; 4 Nev. & M. 807. (b) 4 East, 469.

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ed no interest in the soil, so as to exclude C. and those claiming under him from getting coal there; and that it could not operate as an exception or reservation out of the grant in respect to B., inasmuch as he had not the legal title in him at the time; he was in law no more than a stranger to the estate, and could not except or reserve that which he had not before. *Moore v. Earl of Plymouth* (a) was a decision to the same effect, on a right similar to that claimed in the present case. Being pleaded as a reservation, it cannot be construed as a grant. It is true that the plea goes on to state, that "by the said indenture Wade granted to Widmore, &c., their heirs and assigns, the said liberty or privilege so mentioned herein to be excepted and reserved as aforesaid;" but the deed itself contains no such absolute grant. In Sheppard's Touchstone (p. 80), it is laid down, that a reservation, to be good, must be made to all, some, or one of the grantors, and not to a stranger to the deed. So, a right of entry cannot be reserved to a stranger to the estate. In truth, therefore, nothing passed to Widmore by the deed of 1712.

But a further question arises on the construction of the deed, upon which depends the issue on the first plea to the new assignment, viz., whether the defendant Hawker had a right to enter on the land by his servants, he not being present. It will be contended that the reservation of the liberty to come on the land "with servants or otherwise," implies a right in the grantee to send his servants not in his presence. A license or grant of this description is construed strictly. The obvious and natural meaning of the words is, to give the licensee a right to enter on the land, either with or without servants accompanying him. Moreover, a right to send *servants* would have been contrary to the policy of the game laws, which at that time, before the passing of the statute 9 Anne, c. 25, allowed a lord of

(a) 7 Taunt. 614; S. C. on error, 3 B. & Ald. 66.

a manor to appoint one gamekeeper only. Here the plea attempts to justify the shooting and carrying away of game by all the three defendants; if it is not supported as to any one of them, it fails altogether.

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Next, as to the second special plea to the declaration, and the second plea to the new assignment, which claim the respective rights therein mentioned, as having been enjoyed for sixty years *by the occupiers of the manor*. It is submitted that there was no evidence to support those pleas. The plea given by the Prescription Act is a mere substitution for the old plea of immemorial enjoyment, and must be supported by the same evidence. [*Parke, B.*—The jury found the facts for the defendants, and no question is reserved as to the evidence.] A lord of the manor has no right, as such, to sport over the lands of others within the manor: *Pickering v. Noyes (a)*. [*Parke, B.*—This is not the case of a lord sporting over tenements within his manor.] The defendants' title arises, if at all, under the deed of 1712, and not in right of the manor. In truth, there was no sufficient evidence of the existence of a manor at all. These issues, therefore, were rightly entered for the plaintiff.

Erle and Smirke, contra.—Three questions arise in this case; two of them upon the construction of the deed of 1712, and the third as to the entry of the verdict on the pleas alleging the right by sixty years' user. The first question is, whether the deed is properly pleaded as amounting to a *grant* by Wade to Widmore, Vidler, and Cox, of the liberty in question? Now, if, in a conveyance from A. to B., there be a reservation to C., a stranger, it clearly cannot operate as a *reservation*, and it will therefore, if it be possible, be construed as a grant. And in *Doe d. Douglas v. Lock*, it was expressly held that a reservation (so

(a) 4 B. & C. 648.

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called) in a lease, of the same liberty as in the present case, viz., "of hawking, hunting, fishing, and fowling," is not legally a reservation or exception, but a *privilege granted to the lessor*. The cases cited on the other side do not conflict with this view of the case. *Moore v. Earl of Plymouth* is, indeed, an authority in favour of the defendants. There the plea was held bad only on the ground that it did not allege a *grant*, but a mere reservation of the liberty, and therefore did not set forth the deed according to its legal operation. The Court held it to amount to a grant, but could not construe it so because it was not so pleaded. [*Parke, B.*—According to *Doe d. Douglas v. Lock, reservations*, properly so called, are only of rents or services, and a reservation of an easement or privilege, whether to a stranger or not, operates as a fresh grant. *Alderson, B.*—The authorities there cited from Sheppard's Touchstone (*a*) and Lord Coke (*b*) are to the same effect; that this is not at all a reservation, properly so called, but a grant.] *Chetham v. Williamson* is altogether distinguishable: that was an action of trover for coals, and the plaintiff could not succeed unless he shewed a property in them. There the terms of the deed did not purport to operate as a reservation, but merely as a covenant to permit the plaintiff to enter and dig for coals, which amounted to a mere license, and could not convey any interest in the soil, or property in the coals under it. *Pickering v. Noyes* has no application to this case. On the authority, therefore, of *Doe d. Douglas v. Lock*, this reservation operated as a grant of the liberty to the three parties named in the deed, and the deed being pleaded according to its legal effect, the issue on that plea (the first special plea to the declaration) ought to be entered for the defendants.

The next question is, whether the terms of the grant are to be construed so as to entitle the grantee to sport by

(a) P. 80.

(b) Co. Litt. 47. a.

servants. The defendants contend, that it is a liberty or privilege to the same extent to which a lord of the manor would be entitled, if he had not conveyed away the land: *i. e.* by himself, or by a servant if he choose to appoint a gamekeeper. The words "or otherwise" are amply sufficient to include the right to this extent; and all the words of the grant ought to have their effect. The previous words would include the right to go *alone*. If the grant be construed otherwise, then, if the grantee became infirm, or fell ill, he could not enjoy the right at all. [*Alderson, B.*—Or the manor might be in an infant or a woman.] It never could have been intended that the right should be incapable of user under such circumstances. It may be said, that unless a more limited construction be put upon the grant, the lord may send a great number of servants, so as to destroy all the game and do injury to the land; but he may do the same by taking as many with him. Or if that be unreasonable, he would be restricted to a reasonable use of the liberty. The grantor would have the security of the law for the non-abuse of the grant. [*Alderson, B.*—What is the object of the reservation—pleasure or profit? If the former only, it would be personal.] The right to go on the land *with servants* shews that profit was contemplated. It was held in *Davies's case* (*a*), that a liberty for the lords of a manor, their tenants and farmers, to take fowl in the warren of another, was a profit à prendre in alieno solo, for which the tenants might prescribe in a que estate. In Com. Dig., Chase, H. 1., it is laid down, that if a party "has a license for him *and his servants* to hunt at his pleasure, he may also kill and carry away; for the license for the servants imports an interest in the thing." The authority cited is Manwood (*b*), c. 18, s. 3:—"If a man have a license for himself and his servants to hunt and chase in a man's chase, park, or warren at his

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(*b*) P. 108.

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pleasure, by these words, *for him and his servants*, shall be understood a license of profit, and the grantee may hunt, kill, and carry away; for these words, 'for him and his servants,' do imply that the grantee hath property in the thing hunted, because that by such a license, the grantee may justify for his servant to hunt, which is more than a license of pleasure." The distinction between a license of pleasure and of profit is more fully stated in a subsequent section (sect. 5) (a). So, if I grant to a man to take trees in my field, he may send his servants to get them.

Lastly, as to the issues on the second special plea to the declaration, and the second plea to the new assignment. There was strong evidence of reputation of a manor, by the appointment of gamekeepers. But the replication does not put in issue the defendant's title to the manor, but only denies the exercise of the right as claimed, during the sixty years. The learned Judge left to the jury the question whether there had been an enjoyment for sixty years as of right, and they found it in the affirmative. That was a question of fact, and did not depend upon the deed, which was put in to prove the other issue. [*Alderson*, B.—The jury have found the exercise as of right *under the deed*, and the question is, whether the deed gives the right. The finding could not have been as it was on this issue, but for the deed.] Even if the parties exercised the right under an erroneous notion that the deed gave it them, that is a case precisely within the Prescription Act, and after sixty years enjoyment the right became absolute. [*Alderson*, B.—The question is, whether that can be so under this plea, which claims the liberty in right of the occupiers of the manor. *Parke*, B.—The plea can only be supported by proof of a right exercised as appurtenant to the manor.

Cur. adv. vult.

(a) P. 112.

In Trinity Term, the judgment of the Court was delivered by

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PARKE, B.—This case was tried before my Brother *Coleridge*, at the last Summer Assizes at Winchester, when several points were reserved, which were fully argued before my Brothers *Alderson*, *Gurney*, and myself, at the sittings after Hilary Term.

It was an action of trespass qu. cl. fr. against the defendant Hawker and two others, for entering the plaintiff's closes, and hunting and searching for and killing game.

The special pleas were, first, that Vidler and Cox were seised of the manor of Bullington, in trust for Widmore, and that Widmore, Vidler, and Cox, by an indenture, in 1712, between them and Wade, and sealed by Wade, released parcel of the demesne lands of the manor of Bullington, comprising the locus in quo, to Wade, "excepting and always reserving to Widmore, Vidler, and Cox, their heirs and assigns, liberty, with servants or otherwise, to come upon the lands so conveyed, and there to hawk, hunt, fish, and fowl at any time thereafter, at their will and pleasure: and the said John Wade did thereby grant to Widmore, Vidler, and Cox, their heirs and assigns, the said liberty so excepted and reserved." The plea then states a release and conveyance from Vidler and Cox to Widmore of the manor and liberty, and deduces from him a title to both to the defendant Hawker, and he and the others, as his servants and in his company, justify the trespasses by virtue of the liberty.

The second special plea states, that the occupiers of the manor had used and enjoyed, and Hawker as such occupier was entitled to use and enjoy, the right of hunting, hawking, and fowling, for sixty years, by themselves and with servants.

The replication to the first plea takes issue on the alle-

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gation of a grant. That to the second denies the user and enjoyment. There was a new assignment of the trespasses committed by the two other defendants, by command of Hawker in his absence, in hunting, &c.; and pleas to the new assignment—first, a reservation and grant of a liberty, in the like terms and by a similar deed to that in the second plea, to hunt, &c. *by* servants; secondly, a similar plea to the third, of sixty years' user, by the occupier and *by* servants.

The replication to the first plea to the new assignment denied the grant; to the second, denied the user and enjoyment.

The principal questions in the case were, how the issues raised by the replication to the first special plea to the declaration, and the first plea to the new assignment, ought to be found, and that depends upon the legal effect of the deed of 1712.

The liberty "of hawking, hunting, fishing, and fowling," is, by the terms of that deed, "excepted and reserved to Widmore, Vidler, and Cox;" but so far as related to Widmore it could not be a good exception or reservation, because he was not a conveying party to the deed; nor is such a liberty, whether it be a mere easement or a profit à prendre, properly and in correct legal language, either an exception or a reservation. This point was expressly decided in the case of *Doe d. Douglas v. Lock* (a), where most of the authorities were cited and fully considered. Lord Denman, in delivering the judgment of the Court, says, "that the privilege of hawking, hunting, fishing, and fowling is not either a reservation or an exception in point of law; it is only a *privilege* or *right granted* to the lessor, though words of reservation and exception are used." As the indenture was executed by Wade, the words of reservation and exception operated as a grant by

(a) 2 Ad. & Ell. 743.

him to the three—Widmore, Vidler, and Cox, and the plea properly stated the legal effect of those words as a grant by him. Consequently this issue ought to have been found for the defendant, and the verdict must be entered accordingly.

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The next question is, how the verdict is to be entered on the replication to the first plea to the new assignment; and that depends upon the legal effect and operation of the words of a grant to persons, their *heirs and assigns*, “of free liberty, *with servants or otherwise*, to come into and upon the lands, and there to hawk, hunt, fish, and fowl.” If these words authorize the grantee to send his servants to hawk, hunt, fish, and fowl for him, in his absence, the issue ought to be found for the defendant, otherwise not.

We are of opinion that this issue must be found for the defendant. The authorities upon this subject take this distinction: that if there be *a personal license of pleasure*, it extends only to the individual, and it cannot be exercised with or by servants; but if there is *a license of profit*, and not for pleasure, it may. This will be found so laid down in the case of *The Duchess of Norfolk v. Wiseman* (a), which appears to be the leading case on this subject.

The *Duchess of Norfolk's case* was this:—The Duchess brought an action for chasing in her park, against Wiseman and others. They pleaded that the Duchess licensed the Earl of Suffolk to hunt at his pleasure in the park, and they shewed, at the time of the trespass, the Earl came into the park, and the defendants with him, to hunt: and it was moved that the plea was bad, for by the license given to the Earl, which was only for pleasure and extended only to him, and no other could justify by that license; for if I give license to a man to eat with me, none of his servants can justify the entry into my house by reason of that license, for it is a license of pleasure; and so if I give leave to another to go at his pleasure into my orchard, none of

(a) Year Book, 12 Hen. 7, 25, and 13 Hen. 7, 13, pl. 2.

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his servants can justify by that license: but if it is a license of profit, and not of pleasure, it is otherwise; for if one give leave to me to carry over his land with my cart, my servants can justify by his license; and so if one gives me license to have a tree in his wood, my servants may justify the cutting of the wood, and the entry, for I shall have profit by that: and so was the opinion of the Court: and then the defendants said the Duchess gave license to the Earl to hunt, kill, and *take with him* the deer at his pleasure, and then they said that the Earl came there and they with him, and by his command, hunted and took away: and that was held good.

This case is cited, with others, in *Manwood*, c. 18, s. 3, p. 107, and the result is, that, if there be a personal license to an individual to hunt at his pleasure, he cannot take away to his own use the game killed, or go with servants, still less send servants to kill for him, or assign his license to another: but if the person is meant to have a property in the game which he kills, it is otherwise; and therefore if the license is to hunt, kill, and carry away, he may hunt with servants or by servants. And e converso, if there be a license for him *and* his servants to hunt, "by these words, for him and his servants, shall be understood a license of profit; for these words imply that the grantee hath a property in the thing hunted, because that by such a license the grantee may justify for his servant to hunt, which is more than a license of pleasure (a)."

This being the rule of law on the subject, the point to be decided here is, whether the liberty granted is a mere personal license of pleasure, or a grant of a license of profit—a profit à prendre.

The liberty of *fowling* has been decided, in one case, to be a profit à prendre, and may be prescribed for as such (b). The liberty to hawk is one species of *ancupium* (c), the taking

(a) *Manwood*, 108. (b) *Davies's case*, 3 Mod. 246.

(c) *Manw.* c. 18, s. 10, p. 117.

of birds by hawks, and seems to follow the same rule. The liberty of fishing appears to be of the same nature; it implies that the person who takes the fish, takes for his own benefit: it is common of fishing. The liberty of hunting is open to more question, as that does not of itself import the right to the animal when taken; and if it were a license given to one individual, either on one occasion or for a time, or for his life, it would amount only to a mere personal license of pleasure, to be exercised by the individual licensee. But this is a grant by deed, to persons, "their heirs *and assigns*;" it is clearly intended that not merely the particular individual named, but any to whom they or their heirs choose to assign it, should exercise the right; which seems to us to shew that it is an interest, or profit à prendre, which is intended to be granted. Whether the liberty is to be exercised by the licensee or his *servants*, or by the licensee or his *assigns*, makes no difference in this respect; both shew that not a personal license, but a license of profit, was intended to be granted. The case in the Year Book, 11 Hen. 7, fol. 86, bears materially on this view of the case. It is there said, "if one license me *and my heirs* to come and hunt in his park, I must have a writing (that is, a deed) of that license, for a *thing passes by the license*, which indures in perpetuity: but if he license me, one time to hunt, this is good without deed, for no inheritance passes."

It appears to us, that the liberties to hawk, hunt, fish, and fowl, granted to one, his heirs and assigns, are interests, or profits à prendre, and may be exercised by servants in the absence of the master; and further, we think that the addition "with servants or otherwise" does not *limit* the privilege, and exclude the exercise of it *by* servants. "Words tending to enlarge are not (unless the intention is very plain) to be taken to restrain (a)."

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(a) *Earl of Cardigan v. Armitage*, 2 B. & C. 209.

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We therefore think that this issue must be found for the defendant.

The only remaining question is, how the verdict ought to be entered on the issue on the second special plea to the declaration.

The jury found that the usage had existed, and the right had been exercised, for sixty years; but whether they found that it had been exercised for sixty years by the occupiers of the manor, *as such*, which was a necessary fact to be found in order to support the pleas, though the existence of such a manor was not in issue, has been made a matter of dispute by the counsel at the bar, whose statements as to what passed materially differ. The inference from the Judge's note, and the impression of the learned Judge who tried the cause, is, that the jury meant to find that the right was exercised by the occupiers *as* lords of the manor, and we do not therefore think it right to grant any new trial to have this doubt cleared up, especially as the question relates only to the costs of the issue, and does not decide the cause. We need hardly add, that we think there was evidence for the jury in support of the plea.

The verdict, therefore, on this issue will be entered for the defendants. That on the second plea to the new assignment remains as found by the jury, for the plaintiff.

Rule accordingly.

On this judgment being pronounced,

Butt moved for a rule to shew cause why judgment should not be entered for the plaintiff non obstante verdicto, on the several issues on which the Court had directed the verdict to be entered for the defendants.—On the second plea to the declaration, and the first plea to the new

assignment, he contended that the reservation could not operate as such, but could only create a liberty *in gross*, and that in the pleas the liberty was claimed as appurtenant to the manor. The third plea to the declaration was framed upon the statute 2 & 3 W. 4, c. 71, s. 5, which in express terms applies only to rights which can be claimed *by the occupiers* of a tenement, *in respect of it*; in other words, as appurtenant to it. The right set out in this plea was one that in its nature could only be a right in gross—the claim being for the liberty by the occupiers of a manor to sport over lands not within the manor; and a grant of such a right could only operate (whatever words were used) to create a liberty in gross (a).

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The Court took time to consider whether a rule should be granted: and now

PARKE, B., said that the Court were clearly of opinion that a good title was deduced, on the face of the pleadings, to the liberty claimed by the defendants, and therefore there must be no rule.

Rule refused.

DANIEL WILKINSON and ARCHIBALD WILKINSON v. LINDO.

ASSUMPSIT.—The first count was upon a policy of insurance made by the plaintiffs, under the name and style of D. & A. Wilkinson, as well in their own name, as for and in the name or names of all and every other person or

A declaration on a policy of insurance on goods on board a ship, at the suit of D. W. & A. W., alleged that the policy was

made by them as well in their own name as for and in the name of every other person to whom the same did appertain; and it averred that one T. Z. and the plaintiff A. W., or one of them, were or was then, and from thenceforth until the loss, interested in the goods. To this declaration the defendant pleaded a release by D. W. for himself and his partner A. W. The plaintiffs replied, setting out on oyer the deed of release, by the recital in which it appeared that the intention of the parties was to release only the sums set opposite their respective names in the schedule thereto annexed; and the declaration averred, that the money so released was due upon other and different contracts than those mentioned in the declaration:—*Seemle*, that the replication was bad, as amounting to an argumentative denial of the release mentioned in the plea.

Held, also, that the plea was a good answer to the action.

(a) See *Flight v. Thomas*, 10 Ad. & Ell. 590; 2 P. & D. 531.

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persons to whom the same did or should appertain, in the sum of £100, upon the goods in the ship Glenaladale, on a voyage from Llanelly to Jamaica. And the declaration averred, that one Thomas Lee, and the plaintiff A. Wilkinson, or one of them, were, or was, then and from thence continually afterwards until and at the time of the loss thereafter mentioned, interested in the said goods in the said policy of insurance mentioned, &c., to the value of the monies by them ever insured or caused to be insured thereon : and that the said insurance was made for the use and benefit and on the account of the person or persons so interested. The declaration then averred an average loss by perils of the sea, whereby the assured were obliged to throw three-fourths of the goods overboard. There were also counts for money had and received to the use of the plaintiffs, and on an account stated with the plaintiffs.

Plea, that after the accruing of the causes of action in the declaration mentioned, and before the commencement of this suit, to wit, on &c., the said Daniel Wilkinson, by his certain indenture, sealed with his seal, and now shewn to the Court here, did for himself and his partner the said other plaintiff, Archibald Wilkinson, acquit, release, and for ever discharge the defendant of and from the said several causes in the declaration mentioned, and each and every of them, as by the said release, reference being thereunto had, will fully appear. Verification.

The replication craved oyer of the indenture, which was set out as follows:—This indenture made &c. between the several persons who, by themselves, their partners, or agents, shall execute these presents, being creditors of Elias Hiam Lindo, of &c., of the one part, and the said E. H. Lindo, of the other part. Whereas the said E. H. Lindo is indebted to the several other persons parties thereto *in the several sums of money set opposite to their respective names in the schedule hereunder written*; and he hath by divers losses and untoward circumstances become unable to pay

his debts in full ; and whereas the several creditors of the said E. H. Lindo, parties hereto, have agreed to accept a composition of 5*s.* in the pound *on the amount of their respective debts, and thereupon to execute the release to the said E. H. Lindo, hereinafter contained* : and whereas the said sum of 5*s.* in the pound hath been paid to the several creditors executing those presents, at or immediately before their several executions of the same, as they the said several creditors do hereby respectively admit and acknowledge. Now this indenture witnesseth, that in pursuance of the said agreement, and of the sum of 5*s.* in the pound on the amount of the debts due to the said several creditors of the said Elias Hiam Lindo, parties hereto, so respectively paid to them as aforesaid by the said Elias Hiam Lindo, (the receipt whereof they the same several creditors do hereby respectively acknowledge), they the said several and respective creditors, who, by themselves or the persons respectively authorized by them, have signed, sealed, and delivered, or shall sign, seal, and deliver these presents, for themselves severally and respectively, and for their several and respective heirs, executors, and administrators, and their several and respective partner and partners, each and every of them for himself and his own acts or deeds, heirs, executors and administrators only, and for the acts and deeds of his partner or partners only, have, and each and every of them hath acquitted, released, and for ever discharged, and by these presents do, and each and every of them doth acquit, release, and for ever discharge the said Elias Hiam Lindo, his heirs, executors, and administrators, of and from all and all manner of actions, suits, causes of action and suit, bills, bonds, writings, obligations, debts, dues, duties, accounts, sum and sums of money, judgments, extents, executions, trespasses, losses or claims on policies of insurance, trusts, claims, and demands whatsoever, both at law or in equity, or otherwise howsoever,

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which they the said creditors, or any of them, or their or any of their heirs, executors, or administrators, either separately from, or in conjunction with their or any of their partner or partners, now have or hath, or hereafter shall or may have, challenge, claim, or demand upon, from, or against the said E. H. Lindo, his heirs, executors, or administrators, or his estates or effects, or any part thereof, for or by reason or on account of all and every or any of the debts or sums or sum of money to them the said creditors, parties hereto, or any of them, either separately from or in conjunction with their or any of their partner or partners, due and owing from and payable by the said Elias Hiam Lindo, or any interest, exchange, or commission due or demandable for the same, or for or by reason or on account of any other matter, cause, or thing whatsoever, in respect of the said debts, sum or sums of money, or any part thereof. In witness whereof, &c.

The replication then set forth the schedule at the bottom of the deed, which contained, amongst others, the following signature:—"Daniel Wilkinson, for self and partner, £89 15s. 4d.":—and then proceeded as follows:—"which being read and heard, the plaintiffs, for replication in this behalf, say, that the sum of £89 15s. 4d. set opposite to the name of the plaintiff, Daniel Wilkinson, in the schedule under the said indenture written, was a sum of money wholly distinct and different from any of the sums of money in the declaration mentioned, and was due from the defendant for and in respect of certain dealings and contracts wholly distinct and different from the said contracts in the said declaration mentioned; and that the said monies, sought to be recovered by this action, were not, nor was any part thereof, included, or meant by the plaintiffs or by the defendant to be included, in the sum of £89 15s. 4d. or in the said release; nor was the sum of 5s. in the pound, or any composition or sum, ever paid or agreed to be paid, to the plaintiffs, or to be accepted by them, for or in respect of the monies due and payable by and from the de-

fendant to the plaintiffs, in respect of the causes of action in the declaration mentioned." Verification.

Special demurrer, assigning for causes, that the said indenture set out on oyer is a release of the said causes of action in the declaration mentioned; and also that the averments in the said replication are an argumentative and indirect denial of the averment in the plea, viz. that the plaintiff, Daniel Wilkinson, had released the defendant from the causes of action in the declaration mentioned, whereas, by the rules of law, the said averment should have been directly and expressly traversed and denied. And also for that the said replication is double and multifarious, and avers several matters, upon not one of which singly the defendant could have safely taken issue; and also for that the said replication tends to an improper and unnecessary length of pleading.

Joinder in demurrer.

The plaintiffs' points for argument were as follows:—

The plaintiffs will argue that the plea is bad; because the deed set out on oyer does not release the causes of action mentioned in the declaration, inasmuch as the words of release are controlled by the recital, and cannot be extended to the sum payable on the policy in the declaration mentioned, the interest in which was not in the party executing the release.

Martin, in support of the demurrer.—The replication is bad, as being an argumentative denial of the averment in the plea, that the causes of action were released. The plaintiffs should not have gone on to deny argumentatively that the causes of action were released, but should have said so at once in distinct terms.—He was then stopped by the Court, who called upon

R. V. Richards, contra.—The replication is good, and the plea bad. The recitals in the composition-deed shew what the release was intended to comprehend. This form

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of replication was adopted in *Payler v. Homersham* (a), and not disapproved of. Lord *Ellenborough* there says :—"I do not find that Lord *Holt*, when he denied the authority of the case from Roll's Abr., denied also the position of *Gregory*, J., that the general words of a release may be restrained by the particular recital. Common sense requires that it should be so; and in order to construe any instrument truly, you must have regard to all its parts, and most especially to the particular words of it." Looking at this deed, it applies only to the particular debts which are inserted against the seal of the particular creditors, and not generally. That could not have been shewn except by an averment setting forth the deed. *Payler v. Homersham* was recognised in *Simons v. Johnson* (b). There Lord *Tenterden* says :—"It appears to me, that *Payler v. Homersham* is well founded in law and common sense, and is not distinguishable from the present case. It is said, we must look to the recital of the release, and find something there sufficient to confine the effect of the general words. If I do so here, I find this was intended to operate as a qualified release." The same view was adopted by the other Judges. *Solly v. Forbes* (c) is an authority to the same effect. [*Parke*, B.—You might have traversed the fact alleged in the plea, that one of the plaintiffs released the causes of action for himself and his partner, without setting out the release on oyer. You do not either traverse, or confess and avoid, the allegation in the plea that D. Wilkinson released. You may amend, and traverse the release]. Then, secondly, the plea is bad. It does not appear from the declaration, that the interest was in Wilkinson, and therefore the release by him would not extinguish the debt. It is only stated, that Thos. Lee and the plaintiff A. Wilkinson, or one of them, was interested. The interest may have been in Lee only. [*Parke*, B.—Would not the release by Wilkinson put an end to

a) 4 M. & Selw. 423.

(b) 3 B. & Adol. 175.

(c) 2 B. & B. 38.

the contract, on the action being brought in his name? *Exch. of Pleas, 1840.*
Gibson v. Winter (a) seems to me an authority that it would. The matter was there a good deal considered, and it was held, that whatever constitutes an answer to the demand for which an action is brought, as against the plaintiff on the record, is a bar to the action, although brought for the benefit of others, who have no mode of enforcing their claim except by suing in the name of the plaintiff. It is quite enough if Wilkinson could not sue on account of there being a release.]

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Richards then prayed and obtained

Leave to amend, on payment of costs.

(a) 2 Nev. & Man. 737; 5 B. & Adol. 96.

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The EARL OF HARBOROUGH v. SHARDLOW (a).

TROVER for timber and other trees, &c. Pleas, first, not guilty; secondly, that the plaintiff was not possessed as of his own property of the goods and chattels in the declaration mentioned: on which issues were joined. At the trial before Lord *Denman*, C. J., at the last assizes for the county of Rutland, the facts appeared to be as follows:—

The plaintiff is the owner of considerable estates in the parishes of Stapleford, Saxby, and Wymondham, in the county of Leicester, and resides at his mansion in Stapleford Park. The Oakham Canal, which was made in the year 1794, under the powers given by the 33 Geo. 3, c. 103,

Where a canal act enacted, in one clause, that after any land should have been set out and ascertained for making the canal, &c., it should be lawful for all persons seized or possessed of or interested in such lands, to contract for, sell, and convey them to the canal company, and that all such contracts, sales, and assurances should be valid and effectual in law, and all such contracts, &c. should be made at the expense of the company, and enrolled with the clerk of the peace, and copies thereof, signed by the clerk of the peace, should be evidence: and a subsequent clause enacted, that upon payment of such sum or sums of money as should be contracted or agreed for between the parties, or determined and adjusted by the commissioners, or assessed by a jury, in manner therein-before mentioned, the lands should be vested in the company:—*Held*, that, by reference to the former clause, the contract, in order to vest the lands in the company, must be in writing; and that, therefore, proof of payment by the company, for particular lands identified in evidence, was not sufficient proof of title in the company.

(a) This case was decided in Trinity Term, but the report of it has been unavoidably postponed.

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runs through his lordship's lands in Saxby and Wymondham, and the towing-path was originally constructed on the west side of the canal, on the same side as his mansion and park. In the year 1830 the plaintiff enlarged his park, taking into it several inclosures in Saxby and Wymondham, and extended it to the canal. He at that time prevailed upon the canal company to allow him to change the towing-path from the west to the east side of the canal, and he made his park paling nearly close to the edge of the canal, on the west side of it, leaving, however, a small slip of land between the paling and the water, on which several trees and shrubs afterwards sprung up. Some of these were, in April 1840, cut down and carried away by the defendant, by the direction of the canal company, on the ground that they were likely to produce injury to the navigation of the canal; for which this action was brought. On the part of the defendant, evidence was given of the payment by the company of the purchase-money for the lands taken by them for the purpose of making the canal and the original towing-path, on the site of which the trees were growing, and the receipts given to them by the plaintiff's father for the land in question were put in. The Lord Chief Justice, in summing up, expressed his opinion, first, that upon payment of the money to the owners of the land, the land vested in the company; and secondly, that the change of the towing-path from the western to the eastern side of the canal did not affect their right. The jury having found for the defendant,

Hill obtained a rule nisi for a new trial, on the ground of misdirection, referring particularly to the 31st and 47th sections of the Canal Act, 33 Geo. 3, c. 103 (a); and con-

(a) Sect. 31 enacts, "That after any land, ground, or other hereditament, shall be set out and ascertained for making the said intended ca-

nal, &c., it shall be lawful for all bodies politic, corporate, or collegiate, &c., &c., and for all and every other person and persons whomsoever,

tending, also, that the simple possession of the plaintiff since the change of the towing-path was sufficient to entitle him to maintain this action.

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who are or shall be seised, possessed of, or interested in any lands, grounds, or other hereditaments, which shall be so set out and ascertained as aforesaid, or any part thereof, to contract for, sell, and convey to the said company of proprietors, all or any part of such lands, &c.; and that all such contracts, agreements, sales, exchanges, and assurances shall be valid and effectual in law to all intents and purposes whatsoever, any law, usage, or custom to the contrary thereof in anywise notwithstanding, &c., &c.; and all such contracts, agreements, sales, exchanges, conveyances, and assurances so to be made as aforesaid, shall be made at the expense of the said company of proprietors, and inrolled with the clerk of the peace of the county in which such lands, &c., shall respectively lie, and copies thereof, signed by such clerk of the peace, purporting the same to be true copies, shall be allowed to be good evidence in all courts whatsoever; for which inrolment, as a copy thereof, the clerk of the peace shall receive the sum of 4*d.*, and no more, for every one hundred words, and so in proportion for any less number of words."

Sect. 41 enables the commissioners, or any five or more of them, by writing under their hands and seals, with consent of the parties, to determine and adjust what sum or sums of money shall be paid by the company, either by an annual

rent or in gross, for the purchase of the lands or grounds which shall be set out and ascertained for making the canal, &c.: and upon their refusal to treat accordingly, &c., empowers the commissioners to issue a warrant to the sheriff of the county to summon a jury to assess the sums or rent to be paid, &c., &c. [in the usual terms].

Sect. 47 enacts, "That upon payment of such sum or sums of money or annual rent, as shall be contracted or agreed for between the parties, or determined and adjusted by the said commissioners, or any five or more of them, or assessed by such juries, in manner hereinbefore respectively mentioned, for the purchase of any such lands, &c., to the owner or owners thereof, or other person or persons entitled to receive such monies or rent respectively, or legal tender thereof made to such owner or owners, &c., at any time after the same shall have been so agreed for, determined, or assessed, &c., such lands &c. and the fee simple and inheritance thereof respectively, shall from thenceforth be vested in and become the sole property of the said company of proprietors, their successors or assigns, to and for the use of the said navigation for ever; and immediately thereupon, but not before, it shall be lawful for them, their agents, workmen, and servants, to enter upon the same, and to dig, cut, trench," &c., &c.

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Adams, Serjt. and *Humfrey* appeared to shew cause, but upon the report of the learned judge being read, the Court called on

Hill (with whom was *Mellor*) in support of the rule.— It cannot be said, under the circumstances of this case, that the company had a possession for twenty years before action brought, of the slip of land in question. There was no proof that, since the change of the towing-path, they had done any act on the west bank. When the main part of the land was inclosed by the plaintiff, this, which is a portion of the same property, must be deemed to have followed the possession of the former. Then, no title was shewn in the canal company, by mere proof of payment of the purchase-money, and production of the receipts. The 31st section of the act manifestly requires a transfer *in writing* of the purchased lands to the company; for it speaks of its being enrolled with the clerk of the peace, and of copies of it being evidence: and the 47th section only vests the land in the company, on payment of such sums as shall be contracted for *in the manner therein before mentioned*, i. e., by writing according to sect. 31. This was the construction put upon the clauses of another act framed in precisely the same words, in *Doe d. Robins v. Warwick Canal Company* (a). If there be any ambiguity in the act, it must be construed strictly against the company, it being their own language, and their duty, as against the public, to make it explicit; especially when a contrary construction would be a repeal pro tanto of the Statute of Frauds. The statute may not render all the formal conveyances necessary which would be required in an ordinary case, but there must be a contract in writing. In all the three cases referred to in the 47th section, viz. 1st, the case of a direct contract with the landowner; 2nd, the adjustment of differences by the commissioners or five of them; and, 3rd, the assessment of the purchase-money

(a) 2 Bing. N. C. 483; 2 Scott, 7.

by a jury, the legislature has carefully provided that there should be a writing, such as should be capable of being made evidence.

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PARKE, B.—I think this rule must be made absolute. The only question is, whether the case was correctly left by the Lord Chief Justice to the jury. The question left to them was, whether the payments proved by the defendant were payments made in respect of the land in question, contracted for by the company with Lord Harborough, for the purposes of the act of Parliament; and his Lordship expressed his opinion, that if they were, that was sufficient to vest the land in the company. The question whether there had been possession by them for 20 or for 40 years, was not left to the jury; if it had, and the jury had found that there had been an occupation for twenty years before the commencement of the action, the verdict might have been supported. I think the direction was not correct; and that it was not sufficient proof of title in the company, to shew payment in respect of the land in question, supposing it identified: but that, in order to convey a title under the 47th section of the act, there must be either payment for land contracted for *in writing*, or payment of the sums determined and adjusted by the commissioners or five of them, or of the value assessed by a jury, in the manner thereinbefore mentioned. [His Lordship read sect. 47.] We are then to look to the prior sections of the act, to see what description of contract it is to which the provisions of the 47th section apply. That is provided for by sect. 31. [His Lordship read that section].

The words of this section clearly shew that the contract referred to is a contract in writing, which would define the precise lands included in it, and leave no doubt, when produced in evidence, what the payment would refer to. It was not, however, left to the jury whether there had been such a contract, but it was assumed by the learned

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Judge, that if the payment was made for this land among others, the case was within sect. 47. If there were a contract in writing, the identity of the lands would appear from the writing, as it would also from the adjudication of the commissioners in writing, or from the inquisition of the sheriff. I think, therefore, that to vest a title in the company, otherwise than by actual conveyance, there must have been payment for lands contracted for in writing, or the price of which was adjusted by the commissioners in writing, or the value of which was found by a jury in writing. This construction entirely agrees with the view taken by the Court of Common Pleas on a similar act, *Doe d. Robins v. Warwick Canal Co.*, which appears to me to be perfectly correct. The Court in that case thought that there was evidence to shew, from the acts of the parties, that payment was so made, and therefore sent the case down to a new trial. There may perhaps be such evidence in this case also; but that question has not been left to the jury. The rule must therefore be absolute for a new trial.

ALDERSON, B.—I am of the same opinion. The clause on which the Court decided in *Doe d. Robins v. Warwick Canal Co.*, was exactly the same as in this case. No doubt a compliance with the provisions of the 47th section will have the effect of giving the company a title; but the question is, what is a compliance with them? It is this—payment under a contract, which by sect. 31 must be in writing, or of the sum adjusted by the commissioners in writing, or of the sum assessed by the jury. The first writing therein mentioned is the contract, which is to be *enrolled*; the second, the adjustment by the commissioners, is to be *under their hands and seals*; then there is a third case, of persons who refuse or are unable from various circumstances to contract: in which case, a jury are to be summoned, and are to assess the value, and, by necessary implication, to

state the lands in respect of which the payment is to be made, which also must be done in writing. It is not necessary that there should be an actual *conveyance*, in order to vest the lands in the company; but there must be payment under one or other of these matters so required to be in writing.

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GURNEY, B., and ROLFE, B., concurred.

Rule absolute.

BEILBY v. SCOTT.

THIS was an action of debt, tried before *Coleridge, J.*, at the York Spring Assizes, 1840, when a verdict was found for the plaintiff—debt £21, damages 1*s.*,—subject to the opinion of the Court on the following case:—

The declaration was founded on the 70th section of the General Pilot Act, stat. 6, Geo. 4, c. 125, and stated, that a vessel, called the Good Intent, navigating in a public navigable river, the Humber, and within the limits of the jurisdiction of the corporation of the guild or brotherhood, masters, and pilots, and seamen of the Trinity House, in Kingston-upon-Hull, one George Shetliffe, a pilot under the jurisdiction of that corporation, and duly licensed and qualified, being, as well as the vessel, within the limits of his license and the extent of his qualification, duly offered to take charge of the said vessel, whereof the defendant had notice, but that the defendant continued in the charge of the said vessel, he neither being a licensed pilot, nor licensed to act as a pilot within the limits in which the vessel then was, contrary to the form of the statute, whereby an action

Where a person selects the course of a ship, and takes the management of her for the purpose of directing her in that course, he is in the charge or conduct of the vessel, within the meaning of the 6 Geo. 4, c. 125, s. 70. The master of a ship is not, however, precluded by that section from employing any moving power, as, for instance, steam or other power *bond fide* used as a moving power, if upon the party applying such power necessarily devolves the selection of the ship's course, and the

charge or conduct of her in that course.

The penalty imposed by the 70th section of the Pilot Act may be sued for by a common informer, and is within the second head of the 76th section. The consent of the Trinity House or Lord Warden is necessary only in the case of pilots licensed by them; but their consent is not required with reference to pilots not within their jurisdiction.

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had accrued to the plaintiff, to demand a sum not exceeding £50, nor less than £20; one-third thereof to go to the plaintiff, and the remainder to be applied to the purposes mentioned in the statute.

The defendant pleaded nil debet.

At the trial, it appeared that a coasting vessel, called the Good Intent, then employed in the coasting trade of Great Britain, was, on the 7th of December, 1839, navigating in the river Humber, a public navigable river, and within the limits of the jurisdiction of the corporation of the Trinity House of Hull—the corporation mentioned in the declaration and in the General Pilot Act—for the purpose of proceeding up that river to Goole; and that whilst there, George Shetliffe, the pilot duly qualified and licensed by that corporation to pilot vessels to Goole, within the limits of his license and the extent of his qualification therein expressed, boarded the Good Intent, and duly tendered his services to pilot the vessel up the river, which were rejected by the master of the vessel: that during the time that Shetliffe was on board, a steam-tug, commanded by the defendant, came up, when Shetliffe exhibited his license to him, the defendant, and, in the hearing of both the defendant and the master of the Good Intent, said, “I am a pilot; I have tendered my services, which have been rejected, and if you (Mr. Scott) take the vessel up, I shall enter an action against you:” on which the defendant said that he did not care, and got a tow-rope fastened from his steam-tug to the Good Intent, and proceeded to tow her up the river, and did so, to Goole; that the defendant selected the course by which the Good Intent and the steam-tug went up the river to Goole, acting on his own judgment, and receiving no orders from the master of the Good Intent: that on the next preceding and the next subsequent voyage up the Humber to Goole aforesaid, the same master of the same vessel, the Good Intent, took a licensed pilot of the same

class with Shetliffe. The ordinary employment of the steam-tug was towing vessels up and down the river, and she had been bonâ fide hired by the master of the Good Intent for the purpose of towing the latter vessel up the river, before the pilot came on board.

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Thereupon it was agreed that the jury should find for the plaintiff, subject to the opinion of this Court; the Court to draw any inference which, in their judgment, the jury ought to draw from the above facts, and to have every power of amendment that the Judge had on the trial, and in other respects the defendant to have the advantage of anything arising on the pleadings. Under these circumstances, the questions for the opinion of the Court are—

First—Whether the defendant had the charge or conduct of the Good Intent, within the meaning of the Pilot Act, 6 Geo. 4, c. 125, s. 70.

Secondly—Whether, the Good Intent being a coasting vessel, employed at the time in the coasting trade, any penalty was incurred.

Thirdly—Whether the plaintiff, who sues qui tam, has a right to maintain the present action under the above-mentioned statutes.

Fourthly—Whether the judgment ought to be arrested.

The points for argument were as follow:—

The plaintiff contends, that he has a right to recover under the general Pilot Act, 6 Geo. 4, c. 125, s. 70, and that the defendant has rendered himself liable to the penalty therein mentioned, and that the objections taken to the declaration are not valid.

It will be argued on behalf of the defendant, first, that the bonâ fide towing of a vessel in the ordinary course of the employment of a steam-tug, is not the having of the charge or conduct of a vessel, within the meaning of the 70th section of the Pilot Act.

2ndly. That the Good Intent being a coasting vessel, no

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3rdly. That there is no authority given by the statute to a common informer to sue in the Courts of Westminster, or, at all events, without the written consent of the corporation of the Trinity House, or Lord Warden, &c. See sections 76 and 77.

4thly. That the declaration is bad upon the face of it, it not being alleged that the proceeding is taken with the consent of the corporation of the Trinity House, or Lord Warden, &c.

Cowling, for the plaintiff.—The first question is, whether the defendant had the charge or conduct of the ship called the Good Intent, within the meaning of the 70th section of the Pilot Act, 6 Geo. 4, c. 125; and it is submitted that he had. The words are, "That it shall be lawful for any licensed pilot, within the limits of his license, and the extent of his qualification therein expressed, to supersede in the charge of any ship or vessel any person not licensed to act as a pilot, or not licensed to act within such limits, or acting beyond the extent of his qualification; and every person assuming or continuing to act *in the charge or conduct of any ship or vessel*, without being a duly licensed pilot, or without being duly licensed to act as a pilot within the limits in which such ship or vessel shall actually be, or beyond the extent of his qualification, as expressed in his license, after any pilot, duly licensed and qualified to act in the premises, shall have offered to take charge of such ship or vessel, shall forfeit for every such offence a sum not exceeding £50, nor less than £20." What is the meaning of the words "acting in the charge or conduct of any ship or vessel?" They clearly must mean to apply to the guiding or directing of the course of the vessel. And the other sections of the act shew this to be the meaning. The 1st section recites, that the

corporation of the Trinity House have, as well by usage for centuries as by grants from the Crown, "pilots, loadsmen, or guides" to conduct vessels within certain limits; and the 2nd section enacts, that the Trinity House shall appoint fit and competent persons duly skilled to act as pilots, for the purpose of conducting all ships and vessels sailing, navigating, and passing on the river Thames. The terms, "loadsmen and guides," are there used as synonymous with pilots. From the language of these sections, it appears that the legislature, using the term "pilot," means the person having the guidance and direction of the vessel. A pilot might be employed to direct the course of the vessel, although a steam-tug is employed as a moving power. Here the case expressly states, that the defendant selected the course of both vessels of his own judgment. In the case of a boat on a canal, the horse moves the boat, but the person at the helm guides it. It does not appear whether the steam-tug was before or by the side of the vessel; but in either case, if the defendant assumed the guidance and direction of the tug, he is in charge of the ship within the meaning of the 70th section, and liable to the penalty.

The vessel is stated to be a coasting vessel, and the next question is, whether she is not exempt by the 59th section, which provides, that the master of any ship or vessel employed in the regular coasting trade of the kingdom, may lawfully pilot the same, without being subject to any of the penalties by that act imposed, so long as he shall conduct or pilot the same without the assistance of any unlicensed pilot, or any other person than the ordinary crew of the vessel. [*Alderson*, B.—That is the same question as the first. *Parke*, B.—The master of a coasting vessel is not bound to employ any one to conduct the vessel; but he may do so, and if he does, it must be a person duly licensed to act as a pilot.]

Then the third question is, whether the penalty can be

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sued for by a common informer, and it seems clear that he is the proper party to sue. The 76th section enacts, that "all fines, penalties, or forfeitures hereinbefore or hereinafter imposed by this act, or by any of the by-laws, rules, orders, regulations, or ordinances hereby directed to remain in force, or hereafter to be made under the authority of this act, which shall exceed the sum of £20, (the manner of levying whereof shall not by this act be otherwise expressly provided for,) and likewise all fines, penalties, or forfeitures imposed as aforesaid, (the manner of levying which shall not be otherwise expressly provided for), in cases where, the lowest penalty not being greater than £20, and the largest penalty recoverable being greater than £20, the party prosecuting shall proceed in respect thereof for a sum greater than £20, with the written consent of the corporation of Trinity House of Deptford Strond, or of the said lord warden, or his lieutenant for the time being, respectively, (*as the case may be,*) shall and may be recovered with full costs of suit, by action of debt, plaint, bill, or information in any of his Majesty's courts of Record at Westminster, to be commenced within twelve months after such offence or offences shall be committed, or within such other time as is hereinafter in that behalf directed." The part of this section which speaks of suing with consent, refers to the 58th section, which provides that the master of a vessel shall forfeit double the sum demandable for pilotage, and an additional penalty of £5 for every fifty tons burthen, if the corporation of the Trinity House, as to cases in which pilots licensed by them are concerned, or the lord warden for the time being, or his lieutenant, as to cases in which the Cinque Port pilots are concerned, shall think it proper that the party suing shall be at liberty to proceed. The 83rd section shews that the informer is the person to sue; if not, who is? for the penalty is not to go to the Crown. The 76th section is applicable to two classes of cases; but assuming

that the present is within the second branch of it, still that part relates only to cases in which the pilot is licensed either by the Trinity House of Deptford Strond, or the Lord Warden; and therefore this case is not within it, as this took place within the jurisdiction of the Corporation of the Trinity House of Hull, who have a distinct power to appoint pilots, as appears from the 58th section.

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Martin, contra.—With respect to the last objection, the case is within the second branch of the 76th section, and a common informer cannot sue without the written consent of the Corporation of the Trinity House, or lord warden. The right to bring any action at all is conferred by that section only; and if it be a casus omissus, the plaintiff cannot sue. If that should be so, the case is not without a remedy, as the Attorney-General may sue: *Rex v. Malland (a)*. The words of the section, however, are clear, and the object of it was to prevent suits being brought in the courts at Westminster, without the written consent of the Trinity House, or lord warden. The observation on the 83rd section as to the penalty not going to the Crown, is met by this—that actions may be brought by a common informer, with the consent of the Trinity House or lord warden.

The other point is a very important one. This is the first time it has ever been attempted to prevent the owner of a ship from employing a steam-tug for the purpose of towing her through the water. Whatever may be the position of the steam-tug with respect to the vessel she is towing, (though it is generally at the side of the ship) the entire moving power is in the steamer, and the vessel to which it is attached is dragged through the water like a log of wood. *Piloting* a vessel means directing her by means of the helm. The 18th section shews what duties a pilot has to perform—they are to ply without intermission

(a) 2 Str. 828.

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at all seasonable times by day and night, and take charge of vessels. The 19th, 31st, and 34th sections relate to the particular things they are to perform; but there is nothing here to shew that the defendant has done any of the things there enumerated. If the master of the steam-tug has incurred a penalty, so has the master of the Good Intent also. The case states that there was no fraud, but that the employment was *bonâ fide* for the purpose of towing the vessel. The true meaning of the act was to impose a penalty on persons going on board and conducting vessels as pilots, without being duly licensed, and it does not apply to cases where a steam-tug has been used *bonâ fide* as a moving power.

Cowling, in reply.—The words of the act are general, and are not confined to cases where the party goes on board the vessel: they apply to all persons who select the course of the vessel. The 34th section gives a right to pilotage where the boat runs before the vessel, which would not otherwise be due: that shews that the ship may be conducted, within the meaning of the act, by a person in a boat ahead of the vessel, and is not confined to the care of a person on board. *Rex v. Malland* proceeded on the ground that the penalty was not appropriated, which is not the case here. The case of *Malden v. Bartlett* (a) shews that the Attorney-General has no right to sue.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—The first question arising on this case is, “whether the defendant had the charge or conduct of the Ship Good Intent” within the meaning of the Pilot Act, 6 Geo. 4, c. 125, s. 70. We are of opinion that he had neither.

These words are to be understood in the sense ascribed to them in other parts of the act; that is, they mean the

(a) Parker, 105.

taking the charge and direction, as a pilot, whose appropriate, and indeed sole duty it is to select the course, and take the management and conduct of the vessel, for the purpose of directing her in that course. The master of a coasting vessel may, if he pleases, perform that duty himself; but if he chooses to employ another for that purpose, he must employ a licensed pilot; and an unlicensed person taking that duty on himself by command of the master, when a licensed pilot offers his services, would be liable to the penalty in the 70th section.

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But the master is not precluded from employing any moving power which he may please; he may make use of another vessel, or boats, or a steam-tug for that purpose; and if that cannot be done without necessarily devolving upon those who apply the power, the selection of the course, and a certain portion, or indeed all the charge and conduct of the vessel in that course, still if the *bonâ fide* object of the employment be the moving power, the person so employed is not a pilot, and has not the conduct and charge of the vessel as such, within the meaning of the act.

If indeed the real object in any case should appear to be to obtain the assistance of the skill of a pilot, and to give him the charge and conduct of the vessel, and some other colourable duty were assigned to him, the case would be within the act; but in the present instance it is expressly found that the steam-tug was *bonâ fide* hired for the purpose of towing the vessel up the river. We are therefore of opinion that no penalty was incurred in this case.

The answer to the first question makes it unnecessary to discuss the others raised by the special case. As the matter is, however, of general importance, we wish to state, that, in our opinion, the action is properly brought by a common informer; and that it is within the 2nd branch of the 76th section: the meaning of that enactment appears to us to be, that penalties, when the lowest is not greater than £20, and the highest is greater, are to be sued for with the consent of the Trinity House, in cases in which pilots

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licensed by them are concerned; and with that of the lord warden with respect to pilots licensed by him; but that their consent is not required with reference to pilots not within the jurisdiction of either. The words "as the case may be" are explained by the 58th section. The judgment of the Court must be for the defendant.

Judgment for the defendant.

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EJECTMENT by the lessors of the plaintiff, who claimed as co-heiresses at law of Arthur Gramer Miller. At the
Where a deed is in the hands of an attorney, who holds it not merely as attorney, but as a security for money owing to him from his client, and the attorney, being called on a subpoena duces tecum, refuses to produce the deed on the ground of his own lien, the party calling for the production of the deed is entitled to give secondary evidence of its contents.

There are no degrees of secondary evidence; but where a party is entitled to give secondary evidence at all, he may give any species of secondary evidence within his power.

Where, on a former trial of the title to the same property, on an ejectment by the same lessors of the plaintiff against a different defendant, a deed was given in evidence on the part of the defendant, and the limitations in it were stated in Court by the defendant's counsel:—*Held*, that a copy of the short-hand notes of that statement was not receivable in evidence on the part of the same lessors of the plaintiff, in a second ejectment against another party.

Quære, whether such evidence would have been receivable, if the parties to the action had been the same.

Where, in ejectment, evidence was received in favour of the plaintiff which was inadmissible, but all objections and exceptions were reserved for the opinion of the Court above, by the consent of both parties:—*Held*, that the defendant was not entitled to a new trial without payment of costs, on the ground of the reception of this evidence, if the legal evidence admitted shewed the title to be in the lessors of the plaintiff; as, upon such a reservation, the Court are called upon to decide whether the lessors of the plaintiff are entitled to recover or not.

An examined copy of the record of a fine, levied with proclamations, is as good evidence of the fine as the chirograph itself certified by the officer.

A fine was proved to have been levied of the estate in question, in 1790, and the lessors of the plaintiff gave in evidence a deed of conveyance of part of the property in 1802, by the consor of the fine to a purchaser, which stated that the fine was levied to the use of himself in fee. This deed was received without objection on the part of the defendant:—*Held*, that it was good evidence as a declaration of the uses of the fine, although it was not proved that the defendant derived title under the consor.

By a will, in 1789, an estate was devised to A. G. M. for life, with remainder as he should by deed or will appoint, and in default of appointment, remainder to the heirs of his body, with remainders over. In 1790, A. G. M. levied a fine to the use of himself in fee, and afterwards died without issue:—*Held*, in an ejectment by the lessors of the plaintiff, claiming as heirs at law of A. G. M., that the fine created a discontinuance, and gave a tortious fee to A. G. M., and that his heir at law was consequently entitled to recover in ejectment, the remainders over being devested, and the rights of the remaindermen only capable of being enforced by real action.

In such a case the statute 3 & 4 Will. 4, c. 47, s. 38, preserves the right of the remaindermen to bring a formedon.

trial before Lord *Denman*, C. J., at the Warwickshire Spring Assizes, 1840, it appeared that, in 1779, the father of A. G. Miller had devised the property to A. G. Miller for life, with remainder as he should by deed or will appoint, with remainder, in default of and until appointment, to the heirs of his body, with remainders over. A. G. Miller died in 1832 without issue, and it therefore became necessary for the lessors of the plaintiff, who claimed as his collateral heirs, to prove that he had acquired the fee-simple of the property before the time of his death. For this purpose they sought to give evidence of the marriage settlement of A. G. Miller, executed by him in 1789, after his father's death, in order to shew that he had acquired the fee by exercising the power of appointment. This settlement was in the possession of Mr. Baxter, the defendant's attorney, who had been subpoenaed to produce it: and upon his examination, he stated that he had received it from a Mr. Weetman, who was in possession of another part of the property, and against whom the lessors of the plaintiff had previously brought an ejectment, which was tried at the Summer Assizes of 1838, before Lord *Abinger*, C. B., and in which the lessors of the plaintiff were nonsuited. Mr. Baxter stated that he claimed a lien on the deeds for professional business done for Mr. Weetman, and he declined to produce it on this ground. Mr. Weetman himself was in Court, but was not examined, or called on to produce the deed.

Upon Mr. Baxter's refusal to produce the deed, the lessors of the plaintiff proposed to give secondary evidence of its contents. This was objected to on the part of the defendants, but Lord *Denman* ruled that such evidence was admissible. The lessors of the plaintiff then tendered in evidence a copy of the deed; but upon examination it appeared that this had been made an attested copy, and was unstamped, and it was consequently rejected. It was then proposed to read, as secondary evidence of the contents of

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the deed, a short-hand writer's notes of the proceedings of the trial in the former action, when the settlement had been produced and proved by the then defendant Weetman. This evidence was objected to, but Lord *Denman* allowed it to be admitted, and the short-hand writer's notes were read; but it appeared from them that the deed had not been actually read by the officer of the Court, but that its contents were stated by the defendant's junior counsel. It was objected that this statement could not be received, but Lord *Denman* considered that it was substantially the same as if the deed had been read by the officer, and accordingly the note of this statement was read, and it thereby appeared that A. G. Miller had exercised the appointment in favour of himself and his heirs in fee, subject to a life interest in part of the estate to his wife, who died before him. The lessors of the plaintiff then tendered, as further evidence that A. G. Miller was seised in fee, an examined copy of the record of a fine, with proclamations, levied by A. G. Miller in 1790. This was objected to by the defendant's counsel, who contended that the chirograph should have been produced, but the learned Judge overruled the objection, and the examined copy was received. The lessors of the plaintiff also proved a deed of conveyance, subsequent to the fine, from A. G. Miller to a purchaser of part of the estate in question, which recited the fine and settlement, and stated that by the latter the uses of the fine had been declared to A. G. Miller in fee. This deed was received without objection, and the case then went to the jury upon the evidence of pedigree, and a verdict was found for the lessors of the plaintiff.

Adams, Serjt., in Easter Term last, moved for a nonsuit or a new trial, on several grounds.—1st, that secondary evidence of the settlement was altogether inadmissible. 2ndly, that even if secondary evidence was receivable, the short-hand writer's notes were not admissible evidence.

3rdly, that at all events they were not receivable, when it appeared that a copy of the settlement was in existence. 4thly, that the estate acquired by the fine terminated with the estate tail of A. G. Miller: and 5thly, that the verdict was against evidence. The Court granted a rule on all the points except the third, which was disposed of on the application. *Adams*, Serjt., urged in support of this point, that, assuming that the short-hand writer's notes might have been evidence if no better evidence had been in existence, it appeared here that better evidence did exist, viz. the attested copy, which the lessors of the plaintiff might have produced if they had procured it to be stamped.—The short-hand writer's notes, at best, amount to nothing more than mere parol evidence. In *Villiers v. Villiers* (a), Lord *Hardwicke* says:—"The rule of evidence is, that the best evidence that the circumstances allow must be given. If an original deed be lost, the counterpart may be read; and if there is no counterpart forthcoming, then a copy may be admitted; and if there should be no copy, there may be parol evidence of the deed, and of the manner of its being lost." This is an authority that parol evidence is not receivable where a copy exists; and the doctrine of this case appears to be admitted in *Munn v. Godbold* (b). In *Doe d. Rowlandson v. Wainwright* (c), the question arose, whether an abstract of a deed of feoffment, which deed was in the hands of the opposite party, who refused to produce it on notice, was admissible in the absence of an examined copy, which might have been produced. The Court decided the case upon another ground, but seemed to think that if a copy had been proved to exist, it should have been produced. [*Parke*, B.—You must contend then, that there is to be primary, secondary, and tertiary evidence. If an attested copy is to be one degree of secondary evidence, the next will be a copy not

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(a) 2 Atk. 71.

(c) 5 Ad. & Ell. 520; 1 Nev. &

(b) 3 Bing. 292; 11 B. Moore, 49. P. 8.

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attested; and then an abstract: then would come an inquiry, whether one man has a better memory than another, and we should never know where to stop. *Alderson*, B.—In *Doe v. Wainwright*, the Court refused to decide the question, because there was another point that made it quite immaterial.] In Buller's N. P. p. 256, the same rule is laid down as in *Villiers v. Villiers*.

LORD ABINGER, C. B.—There can be no rule upon this point. Upon examination of the cases, and upon principle, we think there are no degrees of secondary evidence. The rule is, that if you cannot produce the original, you may give parol evidence of its contents. If indeed the party giving such parol evidence appears to have better secondary evidence in his power, which he does not produce, that is a fact to go to the jury, from which they might sometimes presume that the evidence kept back would be adverse to the party withholding it. But the law makes no distinction between one class of secondary evidence and another. In cases where the contents of public records and documents are to be proved, examined copies are allowed as primary evidence; but this is upon public grounds; for in these cases, the law, for public convenience, gives credit to the sworn testimony of any witness who examines the entry, and produces the copy.

PARKE, B.—I concur entirely in refusing the rule on this ground. There can be no doubt that an attested copy is more satisfactory, and therefore, in that sense, better evidence than mere parol testimony; but whether it excludes parol testimony, is a very different thing. The law does not permit a man to give evidence which from its very nature shews that there is better evidence within his reach, which he does not produce. And therefore, parol evidence of the contents of a deed, or other written instrument, cannot be given, without producing or accounting for the

instrument itself. But as soon as you have accounted for the original document, you may then give secondary evidence of its contents. When parol evidence is then tendered, it does not appear from the nature of such evidence, that there is any attested copy, or better species of secondary evidence behind. We know of nothing but of the deed which is accounted for, and therefore the parol evidence is in itself unobjectionable. Does it then become inadmissible, if it be shewn from other sources, that a more satisfactory species of secondary evidence exists? I think it does not; and I have always understood the rule to be, that when a party is entitled to give secondary evidence at all, he may give any species of secondary evidence within his power. There is a case of *Brown v. Woodman* (a), in which I am reported to have decided this point, and my ruling was not afterwards questioned.

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ALDERSON, B.—I agree with my brother *Parke*, that the objection must arise from the nature of the evidence itself. If you produce a copy, which shews that there was an original, or if you give parol evidence of the contents of a deed, the evidence itself discloses the existence of the deed. But reverse the case,—the existence of an original does not shew the existence of any copy; nor does parol evidence of the contents of a deed shew the existence of anything except the deed itself. If one species of secondary evidence is to exclude another, a party tendering parol evidence of a deed must account for all the secondary evidence that has existed. He may know of nothing but the original, and the other side, at the trial, may defeat him by shewing a copy, the existence of which he had no means of ascertaining. Fifty copies may be in existence unknown to him, and he would be bound to account for them all.

GURNEY, B., concurred.

(a) 6 Car. & P. 206.

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In Trinity Term, *Goulburn*, Serjt., *Humfrey*, and *G. Hayes*, shewed cause against the rule.—First: Parol evidence of the settlement was receivable. The only difficulty arises from Weetman's not having been subpoenaed or called; but this was unnecessary, because Mr. Baxter refused to produce the deed, not on account of his client's title, but on account of a lien which he himself claimed upon the deed. Another answer to this objection is, that it was not taken at the trial. It appeared from Baxter's own evidence, that Weetman was in Court; and if any objection had been made on his account, it would have been immediately answered by calling Weetman. Secondly:—The short-hand writer's notes were good secondary evidence of the settlement. It appeared from these notes, that the deed was produced and given in evidence at the former trial, and it then became the duty of the officer of the Court to read it; but instead of this being done, the material parts were read by one of the counsel of the party producing it. This course was adopted for the more convenient conduct of the trial; and it must be taken that it was substituted for the reading of the deed by the officer of the Court, by the consent of all parties: it was, therefore, the same thing in substance as if the deed had been read in the regular manner by the officer. The deed itself was identified by a witness who formerly had it in his possession, and who saw it in Court and heard it read; and it must be presumed that it was read correctly. The material parts, shewing that the power was exercised by appointing to A. G. Miller in fee, appear from the short-hand writer's notes and the notes of Lord *Denman*; and this was good secondary evidence of its contents. In addition to the short-hand writer's notes, the fine which was proved, and the deed of conveyance to Johnson in 1802, furnish good secondary evidence of the contents of the settlement; for the deed of 1802 recites both the fine and the settlement, and connects them to-

gether, and shews that by the settlement the uses of the fine were declared to be to A. G. Miller in fee; and by this conveyance of 1802, he actually disposes of part of the fee which he had so acquired. Now, as A. G. Miller was enabled, by his father's will, to acquire the fee by exercising the power of appointment, and as the conveyance of 1802 shews that he had acquired the fee, this conveyance is good secondary evidence that he had acquired it by exercising the power of appointment in the settlement, although it did not in terms distinctly shew that the power was exercised.

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But assuming that there was no sufficient secondary evidence of the settlement, the fine alone was good evidence that A. G. Miller was seised in fee.

By the will of his father, the estate was devised to A. G. Miller for life, with a power of appointment over the fee, and a limitation, in default of and until any appointment, to the heirs of his body. Under these limitations it is clear that A. G. Miller was tenant in tail; but a question may perhaps be raised, whether he was tenant in tail in possession or in remainder; for if he was only tenant in tail in remainder, the fine would not operate as a discontinuance: Com. Dig. Discontinuance (C. 5). In *Doe d. Jones v. Jones* (a), there was a devise to a party for life, with remainder to trustees to preserve contingent remainders, with remainder to the heirs of the body of the life tenant, with remainders over. A fine had been levied by the devisee, and the question arose, whether this worked a discontinuance. The Court held, on the authority of *Coulson v. Coulson* (b), that, in consequence of the interposition of the vested remainder in the trustees, the first devisee was only tenant in tail in remainder, and consequently that no discontinuance took place. Here there is no intermediate estate, but

(a) 1 B. & C. 238; 2 D. & R. 373. (b) 2 Atk. 250.

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a mere power, which may or may not be exercised, accompanied by an express limitation to the heirs of the body, not only in default of but ~~until~~ the execution of the power. The effect of this is, that, until the execution of the power, the two estates unite, and the devisee becomes tenant in tail in possession, subject to the estates being disunited or defeated by the execution of the power. A. G. Miller being, then, tenant in tail in possession, the question arises, what was the effect of the fine? It is clear it created a discontinuance: *Doe d. Cooper v. Finch* (a). In that case the question was, whether the limitation of a term of 500 years, prior to the limitation of the first estate tail, prevented the party to whom such estate tail was given from being tenant in tail in possession: and the Court held that it did not, and that his fine worked a discontinuance. There the tenant in tail had died without issue and devised the property; and the Court held, that the effect of the fine was to give him an estate in fee, which was devisable, and passed by the will, and that the remainderman had no estate, but a mere right of action. Then, upon the same principle, the fee acquired by the fine is descendable to A. G. Miller's heirs. In *Doe v. Finch*, the fee acquired by the fine was called a base fee, which is a term commonly used to designate fees determinable on the failure of issue inheritable under an entail; but whether called a base fee, or a wrongful fee, it is clear, from the judgment of the Court, that it did not terminate on the failure of issue, but continued to exist as a fee descendable and devisable after the failure of issue.

It was contended here, that the fine only passed a base fee, which terminated ipso facto on the failure of issue, and that the remaindermen were entitled. [*Parke, B.*—The remaindermen can have no right of entry: all their rights are turned into mere rights of action; and as

(a) 4 B. & Ad. 283.

some one must have a right of entry, it must be the heir of the person who had the wrongful fee.] In this case, therefore, the right of entry must be in the heirs of A. G. Miller, who levied the fine; the remainders being discontinued and divested by the fine, cannot be revested except by formedon. *Doe d. Odierne v. Whitehead* (a) is another authority on the subject of a discontinuance arising from the fine of a tenant in tail in possession.

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With regard to the effect of a discontinuance, Littleton, sect. 597, shews that the rights of entry of the remaindermen are taken away and turned into mere rights of action: and sect. 620 clearly shews that a fee is acquired by the party creating the discontinuance. In these passages, a discontinuance by feoffment is treated of, but a fine includes a feoffment. By some writers it is called a feoffment of record, by others an acknowledgment of a feoffment. All agree that it has the same effect as a feoffment in creating a discontinuance, and this is shewn by *Doe v. Finch* and *Doe v. Whitehead*.

If it be considered that there is no sufficient evidence of any declaration of use of the fine levied by A. G. Miller, the consequence will be that the use will result to the conusor of the fine: *Armstrong v. Wolsey* (b). In that case no declaration of use was shewn, and the Court held that the use resulted to the conusor. In the present case, therefore, the fine is evidence of a fee in A. G. Miller, to whom the use resulted if none was declared.

But a point may be raised on the other side, as to the nature and extent of the use that results. There was some little confusion formerly on that subject in the books, in many of which it is laid down that *the old use* results, and a doubt has arisen as to the meaning of this term. In two cases, viz., *Argol v. Chiney* (c) and *Waker v. Snowe* (d), it was de-

(a) 2 Burr. 704.

(b) 2 Wils. 19.

(c) Latch, 82.

(d) Palm. 359.

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cided that where a recovery was suffered, and no use declared, the use that resulted was an estate tail only, that being said to be the old use. The effect of these decisions was to render the recovery entirely inoperative, and the party suffering it was left just where he was before the recovery was suffered. In 1 Cruis. Dig. 378 (4th edit.), the inconvenient effects that would have followed from these decisions, if adhered to, are pointed out, and it is clear that they must now be considered as overruled (a). In *Nightingale v. Earl Ferrers* (b), it was admitted on all hands that on a recovery by tenant in tail, without any declaration of use, the use resulted in fee and not in tail, and that was so laid down several times afterwards by Lord *Hardwicke* (c). In a very recent case, *Tanner v. Radface* (d), this question was again raised; and the Vice-Chancellor held it to be clear, that the effect of a recovery suffered by tenant in tail, without any declaration of use, is to enlarge the estate tail into a fee. There appears to be no express authority with respect to a fine, but the same principle must apply to both. The effect of the fine is to create a discontinuance, and to change an estate tail into a wrongful fee; and if the use of the fee does not result to the conusor of the fine, in whom can it be? The use cannot result in tail, because the estate tail is discontinued; nor can any use result to the remaindermen, for their estates are divested, and turned into mere rights. If the use had been declared by the conusor of the fine, it would clearly have passed according to such declaration; this is shewn by *Doe v. Finch*, and *Doe v. Whitehead*; but it cannot be argued that the legal effect of the fine will vary, according as there is or is not a declaration of the use by the tenant in tail. A party may declare the uses of a fine after the fine has been levied; but what becomes

(a) See *Sanders on Uses*, 102, (c) 1 Atk. 9; 3 Atk. 313.
(4th edit.) (d) 6 Sim. 21.

(b) 3 P. Wms. 207.

of the use in the interval between the fine and the declaration? In ordinary cases it results, during the interval, to the conusor; but if, in the case of a tenant in tail, nothing result but an estate tail, how can he afterwards declare the use of the fee? A party cannot declare a use which he has not got to declare. No distinction can therefore exist, whether the use results or is declared. The whole fee passes by the fine, and must belong either to the conusor or the conusee. And as, in the absence of a declaration, nothing goes to the conusee, the whole must result to the conusor. In the present case, therefore, secondary evidence of the settlement may be entirely dispensed with, as the fine alone is sufficient proof that A. G. Miller was seized in fee. [*Parke, B.*—How is this question affected by the late stat. 3 & 4 Will. 4, c. 27, which abolishes real actions, and substitutes an ejectment? If a remainderman, whose estate has been discontinued, be entitled to bring ejectment instead of formedon, can the right to bring ejectment be in two parties at the same time?] The question is not affected by that statute. By section 39, rights of entry are not to be defeated by discontinuances made after December 31st, 1833; but by section 38, the right to bring real actions, in respect of previous discontinuances, is preserved; and formedon would therefore be the only remedy to revest the estate.

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Adams, Serjt., M. D. Hill, Sir W. W. Follett, and W. T. S. Daniel, *contra*, were first heard on the evidence, as to the facts of the case, on which the Court intimated an opinion that there ought to be a new trial on payment of costs. They then addressed themselves to the objections in point of law.—The defendant is entitled to a nonsuit, or at all events to a new trial without payment of costs, on several grounds.—First, there was not sufficient evidence given at the trial of the settlement of 1789, inasmuch as parol evidence of its contents was not admissible under the circum-

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stances of the case. No doubt, if a deed be lost or mislaid and it cannot be produced, secondary evidence may be given of its contents. [*Parke, B.*—If a party does his power to produce the deed, but is not able to produce it, is not that enough? Then is it enough to subpoena the attorney, duces tecum, to produce it? *Marston v. Downes* (a) appears to have settled this.] At all events, no secondary evidence was given of the deed, which was receivable for the purpose of shewing the limitations contained in it, or that the power of appointment was executed by it. The limitations in the deed were not read at this trial, but the lessors of the plaintiff sought to give in evidence a copy of the short-hand writer's copy of the reading of the limitations in the deed by Mr. Daniel, the junior counsel for the defendant, on a former trial respecting the right to other property held under the title; and the learned Judge held it to be admissible. This was a trial of a cause between different parties, entirely unconnected with the parties to this action. If the lessors of the plaintiff desired to prove that these were a correct copy of the limitations in the deed, they should have called the officer of the Court to prove the fact. But taking it that Mr. Daniel read the deed as for the officer of the Court, it would not be binding on third parties. [*Parke, B.*—The statement of the officer of the Court would not be evidence, unless it was a statement between the same parties.] The present defendant was not a party to the former action.

Next, with respect to the fine. The first objection was that there was not proper evidence of it. The evidence produced was a copy of the chirograph, and an examined copy of the proclamations. It is admitted that an examined copy of the proclamations would be evidence of the proc-

(a) 1 Ad. & Ell. 31; 4 Nev. & Man. 861.

ations; but it is not evidence of the fine. To prove the fine, the chirograph should be produced. The usual mode is, to produce the chirograph, and prove an examined copy of the proclamations. The former is the only proper evidence of the fine; and this evidence was therefore improperly received.

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Then as to the effect of the fine.—The parties to it were John Mitchell and James Chartres plaintiffs, and Arthur Gramer Miller deforciant; and there being nothing to shew that A. G. Miller had executed the power of appointment, and acquired the fee by that means, it was sought to prove, that, as this fine worked a discontinuance, there had been an express declaration of the use to A. G. Miller in fee. For which purpose the deed of 1802 from A. G. Miller to Johnson, conveying property held under the same title, reciting both the fine and the settlement, was put in evidence, and it was said that this was good secondary evidence of the contents of the settlement, and connected the fine and settlement together, and shewed that by the settlement the uses of the fine were declared to A. G. Miller in fee. But there was no evidence of the custody from which this deed was produced, and it was therefore not receivable in evidence; and further, the defendant was no party to it, nor claimed under it, but was a perfect stranger. Again, even though the evidence of the fine should be held sufficient, there was no legal evidence of any declaration of uses at all; nor anything to shew that A. G. Miller had acquired the fee by an exercise of the power of appointment. But then it is said that there would be a resulting use in favour of A. G. Miller, and a fee created by wrong, liable only to be defeated by the remainderman bringing a real action. But there is no authority to shew, that where there is an estate tail, with remainders over, and a fine levied, but no deed to declare the uses, the tenant in tail takes back any larger estate than he had before. The distinction is be-

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tween the effect of a *fine* and that of a *recovery*—a *fine* does not *destroy* the remainders, though it may *displace* them. The effect of a *recovery* is to give to the recoveror a rightful fee-simple—not a wrongful fee, subject to be defeated, as in the case of a *fine*. Then, as by the *recovery* the remainders over are wholly destroyed, it is held, that as there is no deed to lead the uses, the use results to the recoveror in fee. But in the case of a *fine*, no rightful estate in fee is created, and therefore the use results according to the old estate. [*Parke, B.*—In whom would the use be?] In the parties entitled under the old uses. The doctrine of resulting uses is fully stated in Cruise's Digest, where it is said (a):—"Before the Statute of Uses, if a person had conveyed his lands to another, without any consideration, or declaration of the uses of such conveyance, he became entitled to the use or pernancy of the profits of the land thus conveyed. This doctrine was not altered by that statute; and therefore it became an established principle, that where the legal seisin and possession of lands is transferred by any common law conveyance or assurance, and no use is expressly declared, nor any consideration or evidence of intent, to direct the use, such use shall result back to the owner of the estate." In the case of a *recovery* suffered, the rightful fee-simple is vested in the recoveror—not a mere right liable to be defeated by action, as in the case of a *fine*. It is also said in the same work (b):—"It was determined in a modern case," (alluding to *Roe v. Popham* (c)) "where a *fine* was levied by a tenant for life, together with the remainderman in tail and the reversioner in fee, and a declaration of uses was executed by the tenant for life and the remainderman in tail only, that the use of the reversion in fee resulted to the reversioner." It was formerly held, that in the case even of a

(a) Vol. 1, p. 370, s. 19.

(b) Vol. 1, 373, s. 31.

(c) Douglas, 25.

recovery, the assurance enured to the old uses. "When a tenant in tail suffered a common recovery of his estate, by which it was converted into a fee-simple, without declaring any uses thereof, it has been doubted whether the use which resulted to him be in fee tail or fee-simple. The language of the old books is, that where there is feoffment, fine, or recovery, without consideration or declaration of uses, these assurances shall enure to the old uses (a)." The contrary was indeed admitted and established in the case of *Nightingale v. Earl Ferrers* (b), with respect to a recovery, and has since been confirmed by the modern authorities, as stated in Cruise's Digest (c). The author there quotes the words of Lord *Hardwicke*—"a common recovery will bar the entail, though there is no deed to lead the uses; because it is in respect of the satisfaction of estate in value, which creates the bar:" and also of *Lee*, C. J., who said, "It is the use of the fee-simple that passes to the recoveror from tenant in tail, and which results to him and his heirs if no use is declared." That is with respect to a recovery. Then, with respect to a fine, Mr. *Cruise* goes on to observe:—"It follows from the above principles, that where a tenant in tail levied a fine without any declaration of uses, he acquired a base fee descendible to his heirs, as long as he had heirs of his body; and in the case of *Roe v. Popham*, it must be presumed that the Court reasoned in that manner; for, upon the death of the tenant in tail without issue, the person who had the reversion in fee was held entitled to the possession of the estate." [*Parke*, B.—The question is, whether that is a *base* fee, in the strict sense of the word. It is not determinable on failure of issue simply, but on failure of issue *and* of the remaindermen bringing their action of *formedon*. The resulting use must go where the legal estate

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(a) *Cruis. Dig.*, vol. 1, 378, s. 55. (b) 3 P. Wms. 207.

(c) Vol. 1, p. 379, s. 60.

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goes.] The only effect of a fine is to create a discontinuance of the remainders over, leaving the remaindermen their action. With respect to the authorities which have been cited, the case of *Armstrong v. Wolsey* (a) is the one which relates to a fine, and it was there held, that a fine levied without any consideration or uses declared shall enure to the old use, in whomsoever it was. There is no authority for the plaintiff, but the contrary. In the other cases cited were cases of recoveries, which are distinguishable on the grounds already stated. [Parker B.—The conveyance gives no consideration, and takes no use. The question is, whether the use does not relate to the conveyor, until a real action is brought by the remainderman. The estate tail becomes a fee by levying of the fine, and a new estate results to the conveyor. Is not that analogous to the case of a recovery; the conveyor is in, not according to the old estate, but of an estate as altered sub modo by the fine?] In the one case there is a rightful modification of the estate; in the other there is a fee created by wrong. Where it is a rightful fee, it is easy to understand that the Courts should say the use is silted; but not where there is a wrongful fee—no right estate at all. [Rolfe, B.—Has the party not the same right estate, until a real action is brought, in the one case as in the other?] The effect of the fine is merely to bar the estate tail. In *Sanders on Uses* (b), there is the following passage which follows the one already quoted on the other side: “Where A. is tenant for life, with remainder to B. in fee, with remainder to A. in fee, and A. and B. levy a fine without declaring the uses of it; it should seem that the use would result to A. for life, with remainder to B. and his heirs so long as he shall have issue, and in default of his issue to A. and his heirs. But I am not aware that the point has been determined.” Undoubtedly, it must

(a) 2 Wils. 19.

(b) P. 102.

admitted that there both A. and B. were parties to the fine. In *Martin v. Strachan* (a), *Lee*, C. J., says, "A fine operates as an extinguishment of the estate tail, and passes a base or a qualified fee; but a common recovery does not operate in that manner; for a common recovery passes not a base fee, but a full, absolute, unlimited, and rightful fee, and is to be considered as the proper conveyance of a tenant in tail, and passes the fee in the same manner as the fee is passed by a feoffment of tenant in fee." There is no direct decision in point; but it will be for the Court to determine whether, there being no declaration of uses, the fine gives the conusor, not an estate according to the old uses, but a new estate in fee. If the fine did not operate to vest an estate in fee in A. G. Miller, then the lessors of the plaintiff are not entitled to recover. There is no evidence to shew who the defendants are. Suppose they were the parties in remainder; the heirs of Arthur Gramer Miller could not bring an action, and turn them out of possession. [*Parke*, B.—Yes:—the old doctrine of remitter does not apply.] It was so held in *Doe d. Cooper v. Finch* (b); but there is another objection to this fine having the effect contended for, which is this: a use can result only from some conveyance from which it appears that no consideration was paid; but the copy of the chirograph of this fine states on the face of it, that a sum of £1100 was paid by the conusees to the conusor, and whether this sum was actually paid or not, or was merely nominal, this copy being the only evidence of the fine before the Court, the plaintiffs are estopped from asserting, and the Court are unable to infer, that this fine was without consideration. The whole doctrine of resulting uses is founded upon this, that the document from which it arises expresses no consideration. As this fine expresses a consideration to have been paid, the legal estate, in the absence

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(a) 5 T. R. 107, n.

(b) 4 B. & Adol. 483; 1 Nev. & M. 130.

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of an express declaration of uses, remains in Mitchell and Chartres, the conusees. In Sheppard's Touchstone (a), speaking of the effect of a bargain and sale, it is said, "There must be some valuable consideration in money or money's worth given, or at least expressed to be given, for the land." "If the deed make mention of money paid, as in consideration of £100 or the like, and in truth no money is paid, yet the bargain and sale is good. And no averment will lie against this, which is expressly affirmed by the deed." In *Armstrong v. Wolsey*, which is relied upon by the other side, the fine is expressly stated to have been levied without consideration. [*Parke, B.*—The objection at the trial was, that the trustees under the settlement had the legal estate. We ought not to allow this objection now, as it might have been removed if it had been taken at the trial.] This objection could not have been made at the trial, because the resulting use upon the fine was not then relied upon. That point is first made in shewing cause against this rule; and the objection, that no use results, is only an answer to the argument which the plaintiffs now raise as to the effect of the fine.

Then as to the effect of the statute 3 & 4 Will. 4, c. 27, with respect to the remedies which the remaindermen now have. That act having, by the 36th section, abolished all writs of right, and by the 2nd section limited the trial of titles to land to actions of ejectment, has virtually abolished the distinction which existed under the law as it formerly stood, between the right to the property and the right to the possession. And as the rights of the remaindermen to the property are clearly not barred by the fine, and they can only bring ejectment, it is submitted that if they can now maintain ejectment, the present lessors cannot; for two persons cannot be entitled at the same time to the possession of the same estate by different titles, as that

(a) P. 222.

would be to make the defendant liable more than once for the same trespass. *Exch. of Pleas*
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The judgment of the Court was now delivered by

PARKE, B.—In this case the Court have already intimated their opinion, that there should be, at all events, a new trial on payment of costs, in order that the question, whether the Millers of London, the silkmen, were descended from Thomas, a younger son of the common ancestor, may be more fully considered; it having been too hastily taken for granted by the jury on the former trial.

But it was contended by the counsel for the defendant that he was entitled to a nonsuit or new trial, on the objections in point of law.

These objections were several.

First, that parol evidence of the contents of the deed of settlement was inadmissible.

Secondly, that evidence of the speech of counsel on a former trial of the same title was inadmissible.

Thirdly, that the evidence of the fine was insufficient.

Fourthly, that if the fine was proved, the heir at law of Arthur Gramer Miller had no title.

It will be necessary to dispose of each of these objections.

As to the first, it appeared that the original settlement was in the hands of Mr. Stafford Baxter, attorney for a Mr. Weetman, but he did not hold it merely as attorney, but as a security for money advanced by him to his client. Mr. Baxter, when called upon on a subpoena duces tecum, refused to produce the deed; and Lord *Denman* was of opinion that secondary evidence of its contents was then admissible, and in that opinion we entirely concur.

The rule on that subject is, that the law excludes such evidence of facts, as from the nature of the thing supposes

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still better evidence in the party's possession or *power* (a); which rule is founded on a sort of presumption that there is something in the evidence withheld which makes against the party producing it. But if such evidence is shewn to be unattainable, the presumption ceases, and the inferior evidence is admissible. If therefore a deed be in the possession of the adverse party, and not produced, or lost and destroyed, no matter whether by the adverse party or not, secondary evidence is clearly admissible; and if the deed be in the possession of a third person, who is not by law compellable to produce it, and he refuses to do so, the result is the same, for the original is then unattainable by the party offering the secondary evidence. And this is one of the points ruled in the case of *Marston v. Downes* (b). But it was suggested, I believe by the Court, on the motion for a rule nisi in this case, that though the attorney might refuse to disclose a title deed or instrument which was confided to him by his client, the client might not; and, until he was subpœnaed to produce the instrument and refused to do so, all was not done which might be done to shew the original evidence unattainable. It becomes, however, unnecessary to consider that point, for two reasons:—first, because here the attorney had a title of his own to the deed, and lawfully refused to produce it, and the party is not bound to buy up that title, and pay the amount for which the attorney holds the title deed: and secondly, because, if the objection had been taken at the trial, it might have been cured by calling Mr. Weetman himself, who was in Court.

The next question is, whether the species of secondary evidence admitted was by law admissible. It was this. In an argument of the junior counsel for the defendant, on a former trial of the same title, the contents of the deed of settlement had been stated; and that statement

(a) Phill. on Evid. 437.

(b) 1 Ad. & Ell. 31; 4 Nev. & Man. 861.

had been received by Lord *Denman* as proof of those contents. It appears, however, from his lordship's report, that the deed was produced on the former trial, and that the counsel stated its contents instead of its being read by the officer; and the statement of the junior counsel, as copied by the short-hand writer, was admitted as secondary evidence. If then, the reading by the officer of the document would have been secondary evidence, the statement of counsel was so. But we are of opinion, that such evidence was not receivable: for supposing what was read by the officer would have been admissible, if the parties to the suit had been the same, (a proposition which is very questionable), here the parties were not the same; for the defendant, against whom this evidence was received, was no party to the former suit.

It was then contended on the argument before us, that as inadmissible evidence had been received, the defendant was entitled to a new trial without the payment of costs. But we are of opinion, that under the circumstances of this case, he was not. . If this part of the case had been submitted as a question of fact for the jury, and improper evidence had been left to their consideration, the defendant would certainly have been entitled to a new trial: but this was not the case, for this question was withdrawn from them; and Lord *Denman* reports, that "all the objections and exceptions were reserved for the consideration of the Court of Exchequer." As no such reservation could have taken place without the implied assent of both sides, we consider ourselves as called upon, by mutual consent, to decide upon all the technical points, whether the lessors of the plaintiff are entitled to recover or not; and if the legal evidence shews the title to be in the heir at law of Arthur Gramer Miller, we ought so to decide, disregarding the immaterial evidence which has been improperly received. And we think that, upon the other evidence, the title was shewn to be in A. G. Miller in fee. By the

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will of his father, the Rev. A. Miller, in 1779, the estate was left to A. G. Miller for life, remainder as he should by deed or will appoint; and in default of appointment, remainder to the heirs of his body, with remainders over. The evidence of the execution of the power of appointment having been given, the lessors of the plaintiff proceeded to make out a title in another way, by virtue of a fine levied by A. G. Miller, with proclamations, in 1790. The evidence given was not the chirograph, but an examined copy of the record of the fine, and of the record of proclamations. The former was objected to, but the objection was overruled, and we think properly overruled; because the chirograph is but itself, in contemplation of law, a copy of the original record delivered out by the chirographer, who is authorized to make and deliver out to the parties such a copy; but an examined copy of the original record is as good as one certified by the officer. This point, indeed, was not raised on the motion for a new trial.

It was then proposed by the lessors of the plaintiff to prove a declaration of the uses of the fine, by proving a deed of conveyance in 1802, from A. G. Miller to a purchaser of a part of his estate, reciting the fine, and stating that it had been levied to the use of A. G. Miller in fee. This document was received in evidence, and no objection taken to its admissibility, either on the trial or motion for the rule nisi. The argument, therefore, of Sir *William Follett*, that it was not admissible at all, comes too late. Assuming the deed to be admitted, it is proof of a declaration of the uses of the fine to A. G. Miller in fee; and the question is, what estate A. G. Miller took by that fine and declaration of uses.

It is contended by Mr. *Daniel*, that on the face of the fine itself, there was a statement of a consideration, namely, £1100 and upwards, given by the conusees; and that this was evidence against the lessors of the plaintiff, to

prove that a valuable consideration was given, and if so, that no use would result to the conusor. But assuming this to be true, the deed of 1802 is evidence to shew that the use was declared to A. G. Miller in fee; and consequently the case is to be considered as if the use had been so declared.

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What then was the effect of the fine, with such a declaration? As Arthur G. Miller was tenant for life, with a power of appointment, remainder in default of appointment to the heirs of his body, and as we assume no appointment to have been made, he was tenant in tail in possession, and consequently, without doubt, his fine operated as a discontinuance, and turned the remainders over into mere rights of action. And the estate taken by the conusor, by virtue of the fine and declaration of uses, was not a base fee, or determinable fee on failure of issue inheritable under the original estate tail, but strictly and properly a fee-simple, defeasible by the remainder-men in tail, by bringing a real action (a). It follows that, until defeated by that mode, the fee-simple continues in and descends from the conusor, and therefore, if in this case the lessors of the plaintiff were the heirs at law, they were entitled to recover.

The late Real Property Act, 3 & 4 Will. 4, c. 47, does not appear to raise any question in this case. The rights of the remaindermen to a formedon are preserved by the 38th section.

The result is, that there must be a new trial on payment of costs: and as this is not a matter *ex debito justitiæ*, we impose the terms on the defendant of admitting, on the new trial, that A. G. Miller was seised in fee at the time of his death; and in case of the death of any witnesses, their evidence is to be read from the Judge's notes, if the party offering the evidence shall think fit.

Rule absolute accordingly.

(a) *Seymour's Case*, 10 Rep. 96 a.

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IN THE EXCHEQUER CHAMBER.

(In Error from the Court of Exchequer.)

VYSE *v.* WAKEFIELD.

A WRIT of error having been brought on the judgment of the Court of Exchequer in this case (*a*), it now came on for argument. The Court, however, on reading the record, were unanimously of opinion, that an averment of notice to the defendant that the policy had been effected was necessary to make the declaration good, and that the judgment must be affirmed.

Judgment affirmed.

(*a*) 6 M. & W. 442.

MEMORANDUM.

IN this Vacation *William Glover*, Esq., of the Middle Temple, and *Stephen Gaselee*, Esq., of the Inner Temple, were called to the degree of the coif, and gave rings,—the former with the motto—"Reginâ et lege gaudet serviens:" the latter with the motto—"Nec temere nec timide."

END OF TRINITY VACATION.

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Exchequer,

AND

Exchequer Chamber.

MICHAELMAS TERM, 4 VICTORIÆ.

CHRISTY v. TANCRED, FINLAY, and Two Others.

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ASSUMPSIT for use and occupation. The defendants Tancred and Finlay pleaded non assumpserunt; the other defendants suffered judgment to go by default. At the trial before Lord Abinger, C. B., at the London Sittings after Trinity Term, it appeared that the defendants, who were directors of the "Trades' Union Bank," personally agreed with the plaintiff, on the 12th of July, 1838, to take from him certain premises in Gracechurch-street, from the Midsummer preceding, for one year certain, with a proviso that if, a month at least before the termination of the

A. let premises to four persons, B., C., D., & E., for a year certain, ending at Midsummer, 1839, with a proviso that if, a month at least before the termination of the year, a request were to him to that effect, A. would grant them a lease for seven, fourteen, or twenty-one years. The lessees were directors of a joint stock bank, and occupied the premises for the purpose of its business. B. ceased to be a director in January, and C. in March, 1839. On the 31st of May, the solicitor of the directors applied to A. to renew the tenancy for another year to the then directors; but no agreement to that effect was finally executed. On the 20th of June, the solicitor applied for a renewal of the agreement for a quarter of a year; to which the plaintiff, on the 23rd, replied "that he should consider of it." Nothing further passed between the parties, but at the Michaelmas following the premises were delivered up to A.:—*Held*, that the four original lessees were liable to A., in an action for use and occupation, for the rent of the quarter from Midsummer to Michaelmas.

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year, a request were made to the plaintiff to that effect, the plaintiff would grant the defendants a lease for seven, fourteen, or twenty-one years. The defendant Tancred ceased to be a director in January, and the defendant Finlay in March, 1839. The premises continued to be occupied by the directors for the time being, for the purposes of the business of the Bank, until the 31st of May, 1839, on which day they made an application to the plaintiff through their solicitor, to renew the tenancy for another year, on the same terms as before, and said "the names would be different." On the 13th of June the plaintiff's solicitor replied, that no objection would be made, and required to have the names of the proposed lessees furnished to him. This was done, and the plaintiff's solicitor, a few days afterwards, sent a draft agreement for a lease for perusal by the solicitor of the directors, with the names of the then directors inserted as the lessees. This agreement, however, was not executed, and on the 20th of June, the solicitor of the directors applied to the plaintiff to know if he would renew the agreement with them for a quarter of a year longer, (the directors being then in negotiation for another house). On the 23rd an answer was returned by the plaintiff, that "he should consider of it." Nothing further occurred between the parties until the following Michaelmas, when the possession of the premises was delivered up to the plaintiff. This action was brought to recover the quarter's rent due at Michaelmas, 1839. It was contended for the defendants, that they were not liable in this action, which was brought for rent accruing due after the period for which they had contracted with the plaintiff, and after they had ceased jointly to occupy. The Lord Chief Baron overruled the objection, and a verdict was found for the plaintiff, damages £105.

Crowder now moved for a new trial, on the ground of misdirection.—This was an action, not against the parties

who actually occupied; but against the parties to the original agreement for one year, as having held over, after the expiration of that period, on the terms of the agreement. Under the circumstances, there was no legal presumption against these defendants, so as to render them liable. It was a question for the jury, whether the plaintiff had not accepted the new directors as tenants for the quarter. He had the fullest intimation that the tenancy of the defendants was to terminate on the 24th of June, and that the other parties were in fact in possession. It cannot be said that *they* were trespassers. [*Parke, B.*—Suppose there had been no negotiation between the parties, and some of the defendants had continued to occupy, they would all have remained liable. It is their duty, at the end of the term, to give up the tenancy: if by themselves, or by sub-tenants, or joint-tenants, they remain in, they are liable as holding over. The question then is as to the effect of the negotiation. Now there was nothing amounting to a contract: nothing was decided on. If the plaintiff had absolutely accepted the names of the new directors as tenants, only reserving the terms, it would have been different.] What defence would the parties who actually occupied have had to an action for use and occupation? [*Parke, B.*—It does not at all follow that the landlord might not recover against the parties actually occupying; he may waive the trespass, and go against them for the actual enjoyment of the land.] Surely not, when he has a remedy against other parties.

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Lord ABINGER, C. B.—I think there is no weight in the objection. These parties were in the relation of landlord and tenants, until the expiration of the lease; and the only question is, whether the negotiation for a fresh lease, pending that demise, is sufficient to preclude the landlord from proceeding against those who held over. This was a

Esch. of Pleas, mere proposal for the plaintiff's acceptance; there was
1840. nothing amounting to an agreement.

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PARKE, B.—It is clear that the original parties to this agreement continued liable for the rent as tenants holding over, unless there was a new agreement by the landlord to accept other persons as his tenants in their stead. The duty of a tenant in this respect is clearly laid down by Lord *Kenyon*, in *Harding v. Crethorne* (a): “When a lease is expired, the tenant’s responsibility is not at an end; for if the premises are in the possession of an under-tenant, the landlord may refuse to accept the possession, and hold the original lessee liable; for the lessor is entitled to receive the absolute possession at the end of the term. But it may be proved that the lessor had accepted the under-tenant as his tenant.” The only question therefore is, whether there was in this case any evidence of an agreement by the plaintiff to accept the new parties as his tenants in place of the old. If the negotiation had been so far final as that he agreed to accept the names at all events, although the rent and other terms of the tenancy were to be afterwards settled, that might be sufficient to put an end to the liability of the original lessees. But there is no evidence of any agreement to accept any particular persons on any defined terms, or of any complete bargain at all, but only of a proposal for a tenancy on certain terms, which never came to anything more. It is therefore the simple case of the lessees holding over by their under-tenants, and consequently they continue liable.

GURNEY, B., and ROLFE, B., concurred.

Rule refused.

(a) 1 Esp. 57.

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DOE *d.* ELIZABETH DAVY *v.* OXENHAM.

EJECTMENT for a house and garden. At the trial before *Coleridge, J.* at the last Devon assizes, it appeared that one Richard Bowden, being seised in fee of the premises in question, in the year 1795 demised them to Thomas Duxham and Ann Duxham for ninety-nine years, if three persons named in the lease, or the survivors or survivor of them, should so long live, reserving an annual rent of £38. In 1815, John Davy acquired the fee in the premises, and on his death they descended to his heir at law, George Davy, who, in 1825, devised them to Elizabeth Davy, the lessor of the plaintiff, in fee. In the year 1802, Ann Duxham, the surviving lessee under the lease of 1795, assigned the premises to the defendant, who paid the rent until 1815, when he entered into an agreement with John Davy, that on Davy's being allowed to make certain alterations in the premises, he should not call on the defendant for payment of any further rent during his life. The defendant accordingly occupied the premises without payment of any rent, until the determination of the lease by the death of the last cestui que vie, in 1837. The present action was thereupon commenced, the defendant having refused to give up the possession. It was contended for the defendant, that the right of the lessor of the plaintiff was barred by the stat. 3 & 4 Will. 4, c. 27, more than twenty years having elapsed since 1815, at which time the right of action, by reason of the non-payment of the rent, first accrued. The learned Judge overruled the objection, and a verdict was found for the plaintiff, leave being reserved to the defendant to move to enter a verdict, if the Court should be of opinion that the statute was a bar.

Where a lessor permits his lessee, during the continuance of the lease, to pay no rent for twenty years, the lessor is not therefore barred, by the stat. 3 & 4 Will. 4, c. 27, s. 2, from recovering the premises in ejectment. The case falls within the latter branch of the 3rd section, which, in the case of an estate or interest in reversion, provides that the right of action shall be deemed to have first accrued when it became an estate or interest in possession. The lessor, therefore, may recover in ejectment at any time within twenty years after the determination of the lease.

Montague Smith now moved accordingly.—The second

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section of the stat. 3 & 4 Will. 4, c. 27, enacts, "that no person shall bring an action to recover any land or rent, but within twenty years next after the time at which the right to bring such action shall have first accrued," &c. The third defines the period when the right shall be deemed to have first accrued in various cases; which, in the case of an estate in possession, is as follows:—"When the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed, or *have discontinued such possession or receipt*, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received." Since this statute, therefore, if a landlord choose to suffer his tenant to remain in possession of the land for twenty years without payment of rent, and without having commenced any proceedings against him, he loses his right to the land. The lessor of the plaintiff was entitled to the rent reserved under the lease, and therefore must be considered as a party who "while entitled thereto, has discontinued the receipt" thereof. [*Rolfe*, B.—Suppose no rent at all were reserved on the lease, what then?] In that case, as there could not have been any receipt of the rent or profits of the land, the landlord would not be barred by the tenant's continuing in possession for twenty years; but where the landlord, by his own laches, allows the tenant to remain in possession without paying any rent, a right to the land will in time accrue to the tenant. The 35th section also provides, that the receipt of the rent payable by any tenant or lessee, shall, as against such lessee or any person claiming under him, be deemed to be the receipt of the profits of the land, for the purposes of the act.

PARKE, B.—I think there is no ground whatever for granting a rule in this case. The point appears to me to be perfectly clear, and I cannot see how any doubt could have been entertained on the subject. The lessor of the plaintiff claims an estate in remainder, expectant on the determination of a lease granted for ninety-nine years, if these persons named in the lease should so long live. She has but the right of *possession* until the end of that period, or the expiration of the last of the three lives. Her case, therefore, falls within the latter part of the 3rd section of the act, which provides, that “when the estate or interest claimed shall have been an estate or interest in remainder or reversion, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent, *in respect of such estate or interest*, then such right shall be deemed to have first accrued at the time when such estate or interest became an estate or interest in possession.” And the 9th section throws light on this subject. It enacts, that “when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing, by which a rent amounting to the yearly sum of 20s. shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion, immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled.” Here

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there has been no adverse claim, and no payment of rent to any other person; it is the mere case of a landlord omitting to compel his tenant to pay the rent reserved by his lease. The right of the plaintiff manifestly accrued on the determination of the lease, and he is entitled to bring his action at any time within twenty years from that period.

ALDERSON, B.—This cannot properly be called a discontinuance of the possession or receipt of the profits. If we were to construe the statute according to the defendant's view of it, we should in fact determine, that a landlord who gets no rent from an insolvent tenant for twenty years, thereby loses the estate.

GURNEY, B., and ROLFE, B., concurred.

Rule refused.

WILLIAMS v. MOULSDALE.

In debt for use and occupation, goods sold, &c. to which the defendant pleaded *nunquam indebitatus* and a set-off, the verdict was entered at nisi prius for the plaintiff, subject to a reference of the cause to an arbitrator, who was to certify whether the verdict should stand, and for what amount, or whether it should be vacated, and a verdict entered for the defendant. The arbitrator certified that the verdict should be vacated, and a verdict entered for the defendant on both issues:—*Held*, that he had a right to do so, and that the certificate was not inconsistent.

THIS was an action of debt for use and occupation, with counts for goods sold, money paid, and on an account stated; to which the defendant pleaded, first, *nunquam indebitatus*; and, secondly, a set-off to the whole declaration. The cause came on for trial at the last Denbighshire Assizes, when it was agreed that a verdict should be taken for the plaintiff for the damages in the declaration, subject to a reference of the cause to an arbitrator, who was to certify whether the verdict so entered for the plaintiff should stand, and if so, for what amount, or whether it should be va-

cated, and a verdict entered for the defendant. The arbitrator certified that the verdict should be vacated, and a verdict entered for the defendant on both issues.

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Townsend, for the plaintiff, now moved for a rule to shew cause why the certificate of the arbitrator should not be set aside, or why a verdict should not be entered for the plaintiff on the first issue.—This certificate, finding for the defendant both on the issue of set-off and on that of *nunquam indebitatus*, is inconsistent. *Fenton v. Dimes* (a) is an authority for the plaintiff. That was an action of *assumpsit*, to which there were pleas of non-*assumpsit*, payment, and set-off. The cause and all matters in difference were referred to an arbitrator, who directed a general verdict to be entered for the defendant. The Court set aside the award, on the ground that the arbitrator, having found that nothing was due from the defendant to the plaintiff, but that the plaintiff was under an obligation to him in respect of the set-off claimed, ought to have found the amount due from the plaintiff to the defendant; and that as he had not done so, his award was inconsistent. [*Parke*, B.—There the arbitrator was to decide all matters in difference between the parties, therefore he should have found the balance: here the only matter left to him to decide is, how the issues in the cause are to be found.] But the finding is inconsistent; since, if there be nothing owing from the defendant to the plaintiff, the case is not within the statutes of set-off. [*Parke*, B.—Supposing nothing be due from the defendant to the plaintiff, and £100 be due from the plaintiff to the defendant, there is no inconsistency. Suppose there were no plea but that of set-off, and the plaintiff could not prove that the defendant owed him anything, and the defendant proved that the plaintiff owed him £100, the verdict ought to be entered

(a) Q. B., Trin. T. 1840; not yet reported.

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for the defendant. There each issue is to be considered as if it were the only one.] Secondly, the certificate ought to be amended, by entering the first issue for the plaintiff. There was no evidence to support the finding for the defendant on that issue: and *Woof v. Hooper* (a) shews that an arbitrator, having power to certify, may enter a verdict on the several issues, according to the evidence. [*Alderson*, B.—There the arbitrator directed a general verdict, under the supposition that he was *bound* to do so; but the Court held that he was not, but that he *might* enter it otherwise.]

PARKE, B.—In the case cited, it was put in argument that the arbitrator had *no power* to enter the verdict on each issue; and the Court only decide that he has power to do so: there was no contest that if he had the power, he ought to have done so. Having done so here, his finding is conclusive, and we cannot enter into his reasons. As to the other point, there is no inconsistency whatever on the record. The arbitrator seems to me to have done quite right.

ALDERSON, B.—The case of *Fenton v. Dimes* is distinguishable from the present; because there the reference being of all matters in difference, and it appearing on the face of the award that something was due from the plaintiff to the defendant, and nothing due from the defendant to the plaintiff, the arbitrator ought to have gone on to find the balance due to the defendant; but here the reference is of the cause only. As to the other point, the case of *Woof v. Hooper* does not appear. There the arbitrator supposed himself bound to order a general verdict, whereas the Court decided that he had the same power as a jury, of directing a verdict to be entered on the several

(a) 4 Bing. N. C. 449.

issues: but here the application is to set aside the finding as against evidence; the answer is, that the certificate of the arbitrator is conclusive on the parties.

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Rule refused.

JEFFERSON v. WARRINGTON.

THIS was a rule calling upon Elizabeth Antrobus, executrix of the plaintiff Jefferson, and upon her husband in right of her, to shew cause why they should not pay the costs of the taxation of the bill of Mr. Morton, the attorney of the plaintiff in this cause. After the plaintiff's death, Mrs. Antrobus, as his executrix, had obtained an order in the usual form for the delivery by Morton of his bill of costs, in order that it might be referred to taxation; and on the taxation less than one-sixth having been taken off, this application was made under the statute 2 Geo. 2, c. 23, s. 23, to compel payment of the costs of the taxation.

After the death of the plaintiff in an action, his executrix obtained an order for referring the bill of the plaintiff's attorney to taxation. Less than a sixth having been taxed off:—*Held*, that the executrix was liable to the costs of the taxation.

Petersdorff shewed cause.—This application cannot be sustained against the executrix. No one but the *client* of the attorney is compellable, under the 2 Geo. 2, c. 23, s. 23, to pay the costs of taxation. The words of the statute are:—"If the bill taxed be less by a sixth part than the bill delivered, then the attorney or solicitor is to pay the costs of taxation; but if it shall not be less, the Court in their discretion shall charge the *attorney or client*," &c. If, at the time of the application to tax the bill in this case, an express condition of payment had been imposed on the executrix, the case would be different. [*Alderson*, B.—She applies as client to tax; she is not entitled to tax the bill unless she be the client; can she afterwards say she is not the client, and is not bound

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by the order of the Court?] It does not follow, because she has obtained the reference to taxation, that she is to be subject to the costs of it, unless the words of the statute are sufficient to comprehend the case. She is not the client, but only his representative. It has been decided that the executor of an attorney is not liable, under the same clause, to pay the costs of the taxation where *more* than a sixth is taken off: *Weston v. Pool* (a).

Crompton, contra, was not called upon.

PARKE, B.—The statute gives the Court power to refer the bill for taxation on the application of “the party or parties chargeable by such bill;” and when it afterwards speaks of the costs being paid, according to the event of the taxation, by the attorney or the *client*, the word “client” is evidently synonymous with the words “party chargeable.” Here the executrix applied as the party chargeable by the bill, to have it referred to taxation.

ALDERSON, B.—The case of the executor of an attorney differs; he is not the person who makes out the bill, and ought not to be held responsible for the act of another person. So here, if it had been the testator who had made the application to tax, the executrix ought not to have been held liable. But the “client” clearly means the “party chargeable,” with the bill, which in this case was the executrix.

Rule absolute.

(a) 2 Stra. 1056.

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DOE *d.* KINDERSLEY and Others *v.* JOHN HUGHES and
ELIZABETH HUGHES.

EJECTMENT to recover a house and lands in the county of Denbigh. The declaration contained three demises, all dated 3rd of May, 1839; the first by R. T. Kindersley and A. Chambers; the second by A. Chambers alone; the third by H. W. Seton and A. Chambers. At the trial before Lord *Denman*, C. J., at the last Denbighshire Assizes, it appeared that the premises in question were a farm (the extent of it did not appear) part of a considerable estate vested in trustees for the benefit of a Miss Shipley, which had been occupied by the defendants for many years as tenants from year to year. The actual period of the commencement of their tenancy was not shewn; but it was proved to be the usage of the estate, that the tenants should enter upon the lands on the 2nd of February, and upon the house and outbuildings on the 1st of May. On the 16th of February, 1838, the following notice to quit was given to the defendants:—

“As agent for and on behalf of your landlords, Henry Wilmot Seton and Alexander Chambers, trustees of Miss A. L. Shipley, I hereby give you notice to quit and deliver up the farm, lands, and premises which you hold under them, at the end of *your present year's* holding thereof. Dated this 16th day of February, 1838.

“J. V. Horne,

“Agent to the trustees.”

This notice was served by the clerk of Mr. Horne, who at the time explained the nature of it to the defendant, John Hughes (he being an illiterate man), and told him that his time for quitting would be in the spring of the following year. The clerk stated that Mr. Horne had authority to receive the rents and manage the estates, and that he (the witness) had on one occasion, four years ago,

A tenant held a house and land from year to year, the land from the 2nd of February, the house, &c., from the 1st of May. On the 16th of February, 1838, a notice to quit was served on him, requiring him to quit and deliver up the farm at the end of his *present* year's holding:—*Held*, that this was a good notice to determine the tenancy in the spring of 1839; it not being shewn on the part of the tenant that the land was not the principal subject of the holding.

A notice to quit, given by a person authorized by one of several lessors, joint-tenants, determines the tenancy as to all.

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let a small farm. Mr. Horne was also called, and stated, that about the end of 1836 or the beginning of 1837, he was in London to settle his accounts with the trustees, (the then trustees being Messrs. Seton and Chambers) and there saw Mr. Seton, and informed him that some of the farms were kept in bad repair, and that the defendants' was one: upon which Mr. Seton directed him to give notices to quit in all such cases. In June, 1838, Mr. Seton ceased to be a trustee, and he and Mr. Chambers conveyed their estate to Messrs. Kindersley and Chambers.

It was contended for the defendants, first, that the notice to quit was insufficient on the face of it, inasmuch as it was to quit at the end of the defendant's *present* year's holding, *i. e.*, in May, 1838, for which it was too late, and that it could not operate to determine the tenancy at the end of a subsequent year; secondly, that there was no evidence of authority from the trustees to Mr. Horne to determine the tenancy. The Lord Chief Justice reserved both points, and a verdict passed for the plaintiff, leave being given to the defendant to move to enter a nonsuit.

Welsby now moved accordingly.—First, the written notice to quit was insufficient. None of the cases have gone so far as to say that a notice in these terms can be applied to a subsequent year. In *Doe d. Williams v. Smith (a)*, where the tenancy commenced on the same days as in the present case, a notice given on the 28th of October, 1833, to quit both land and house “at the expiration of half a year from this notice, or at such other time or times as your *present* year's holding of the premises, or of any part thereof respectively shall expire *after the expiration of half a year from this notice,*” was held sufficient to determine the tenancy in the spring of 1835; but that was by reason of the latter words, which rendered it impossible that the te-

(a) 5 Ad. & Ell. 350.

nant should be mislaid, and the Court therefore rejected the word "present" as surplusage. But here the only words are "at the end of your present year's holding." Now, at the time of the service of this notice, the current year was that which would expire on the 1st May, in the same year; and the insufficiency of the written notice cannot be helped by the parol contemporaneous statement of the party serving it. [Lord Abinger, C. B.—The year then running was that which had commenced on the 2nd of February preceding.] That is on the assumption that the land was the principal subject of the demise, and the house, &c., only the accessory; but there was no evidence from which to infer that. [Parke, B.—Did you ask that that question should be left to the jury?] No—it was for the plaintiff to have given evidence on the subject. [Parke, B.—In that case, *Doe d. Heapy v. Howard* (a) is an express authority against you: it was there held, that it is a question for the jury, which is the principal and which the accessorial subject of demise, in order for the Judge to decide whether the notice for the whole was given in time; and that, if the party against whom he decides does not desire him to leave that question to the jury, it must be taken that he acquiesces in the fact assumed by him as the ground of his decision.]

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Secondly, that there was no proof that Horne had a sufficient authority from the trustees to determine the tenancy. A notice to quit, given by a third party, professing to be an agent for joint-tenants, is not good, unless his act be ratified before the service of the notice: *Doe d. Mann v. Walters* (b). [Parke, B.—Here the party was previously authorized by one of the trustees: that is the same as if that trustee had given the notice: and *Doe d. Aslin v. Summersett* (c), is an express authority that a notice to quit by

(a) 11 East, 498.

(b) 10 B. & C. 626.

(c) 1 B. & Adol. 135.

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one of several joint-tenants, purporting to be given on behalf of them all, is good for all, because the tenant holds the premises only so long as he and *they all* shall agree.]

PER CURIAM—

Rule refused.

GOREN *v.* TUTE.

Where application is made to set aside proceedings for irregularity after eight days, but within the eight days a similar application had been unsuccessfully made to a Judge at chambers, the Court cannot take notice of such application at chambers, unless it be shewn on affidavit, even though the Judge, being in Court, certifies the fact.

HUMFREY had obtained a rule for setting aside the copy and service of the writ of summons in this cause, on the ground that the defendant's place of abode was not set forth in the writ according to the form prescribed by the Uniformity of Process Act, 2 Will. 4, c. 39. The writ was served on the 24th of October. The learned counsel stated, that on the 31st, an application was made to *Gurney, B.*, at chambers, to set aside the service; but the learned Judge declined to interfere. On the 2nd of November, the present rule was moved for; but there was no affidavit to shew what had taken place at chambers.

Corrie shewed cause, and objected that as the Court could know nothing of the application at chambers, unless it was regularly brought before them by affidavit, the present application appeared as the only one that had been made on the subject, and was therefore too late, being after the expiration of eight days from the service of the writ.

GURNEY, B., being present in Court, stated that the application had been made to him as above mentioned; and

Humfrey, in support of the rule, contended that the presence of the learned Judge in Court, certifying the fact, was sufficient, and likened it to the case of a Judge's order, which it never was necessary to verify by affidavit.

PARKE, B.—This is certainly an objection strictissimi juris, but it must prevail. The cause of the delay in making the application ought to have been explained by affidavit. The rule must be discharged, but without costs.

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ALDERSON, B.—The Court can know nothing of what has passed at chambers, but by affidavit. The case of a Judge's order is different; there the order, when produced, speaks for itself; but parties have no right to tax the memory of the Judge as to every case brought before him at chambers.

Rule discharged without costs.

—◆—
DENNE v. KNOTT.

THE defendant being indebted to the plaintiff in the sum of £80, in February, 1831, petitioned the Insolvent Debtors' Court for his discharge, and was discharged accordingly in April in the same year, the plaintiff's debt having been inserted in the same schedule. He was afterwards arrested for a new debt, when the plaintiff agreed to become his bail, on the defendant's giving him a bond for £300, in which sum was included the old debt of £80. The plaintiff, in 1839, sued the defendant on this bond; and judgment having been signed for want of a plea, a *ca. sa.* issued thereon against the defendant, under which he was arrested. Rolfe, B., having made an order for his discharge out of custody, a rule nisi was obtained to set aside this order: against which

Where an insolvent, being arrested after his discharge for a new debt, agreed, on A.'s becoming his bail, to give him a bond for £300, in which amount was included a debt of £80, which had been inserted in the insolvent's schedule:—*Held*, that the insolvent was not entitled to be discharged out of custody, having been taken in execution in an action by A. upon the bond, in which he had suffered judgment to go by default.

Miller shewed cause.—The defendant was entitled to his discharge, the bond in respect of which the judgment was signed, and execution issued, having been given to secure, not only a new debt, but also the old debt of £80, in respect of which the defendant had been discharged under

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the Insolvent Debtors' Act. The bond was a fraud on the other creditors of the defendant, and was in violation of the policy of the statute, that the debtor shall be released in the first instance from the pressure of his debts, in order that he may be able to employ his future exertions in obtaining the means of satisfying, in just proportions, the claims of all his creditors. Here the effect of this bond was to enable the plaintiff to obtain a disproportionate payment out of the future effects of the insolvent; it was therefore altogether void: *Jackson v. Davison* (a), *Tabram v. Freeman* (b).

Ogle, contra.—*Philpot v. Aslett* (c) is an authority to shew that this defendant was not entitled to his discharge. There a debtor, after having been discharged under the Insolvent Debtors' Act, contracted a new debt; and for that debt, as well as for an old debt inserted in his schedule, gave a bill of exchange. Being sued on the bill, he gave a warrant of attorney for the amount, and the Court refused to set it aside. [He was then stopped by the Court.]

PARKE, B.—I am clearly of opinion, that the defendant is not entitled to be discharged out of custody. If he wished to avail himself of the protection given him by the Insolvent Debtors' Act, he should have pleaded his discharge from the sum of £80, and might to that extent have reduced the amount of the plaintiff's demand. This bond was given to secure the sum of £300, of which £220 are a new debt. The security is not illegal as to that sum: indeed, my impression is, that it is not illegal at all. If a party who has been discharged under the Insolvent Debtors' Act, be subsequently arrested on mesne process

(a) 4 B. & Ald. 691.

(b) 2 C. & M. 451; 4 Tyr. 180.

(c) 1 C., M., & R. 85; 4 Tyr. 721.

for a debt in respect of which he was discharged, the law enables him to apply for his discharge; but if an action be brought against him, and instead of pleading his discharge, he allows the plaintiff to obtain final judgment, it is his own default, and the law must take its course. The rule for setting aside the order of my Brother Rolfe must therefore be absolute.

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The rest of the Court concurred.

Rule absolute.

MANN v. WILLIAMSON.

COWLING shewed cause against a rule nisi for judgment as in case of a nonsuit, on an affidavit of the plaintiff, which stated that after *filing the declaration* in this cause, he had been given to understand that the defendant was in insolvent circumstances, and unable to pay the debt and costs, and had therefore instructed his attorney not to proceed to trial. Under these circumstances, the defendant ought to be compelled to accept a *stet processus*.

The affidavit, in answer to a rule for judgment as in case of a nonsuit, stated that the plaintiff, after *filing the declaration*, was given to understand that the defendant was insolvent, and therefore instructed his attorney not to proceed to trial:—*Held*, that this affidavit was not sufficient to compel the defendant to accede to a *stet processus*, but that he was entitled to a peremptory undertaking.

Gray, *contra*, contended that the affidavit was not sufficient to entitle the plaintiff to a *stet processus*, but that the rule ought to be discharged on a peremptory undertaking. The plaintiff did not say that he had not proceeded in the action after he discovered the insolvency, nor that it was after issue joined; neither did he even speak to his *belief* of the fact.—He cited *Symes v. Amor (a)*.

PER CURIAM.—The plaintiff must give a peremptory undertaking. It only appears that the discovery of the insolvency was made after filing the declaration, and the plaintiff does not even speak to his belief of it.

Rule discharged on a peremptory undertaking.

(a) 6 M. & W. 814; 8 Dowl. P. C. 773.

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BENTLEY v. BERRY.

An application for an order under 1 & 2 Vict. c. 110, s. 3, for a *capias* to issue against a defendant, cannot be made to *the Court* at Westminster, but it may be made to a single Judge sitting there.

IN this case *Jervis* applied to the Court to grant a special order for a *capias* to issue against the defendant under the 1 & 2 Vict. c. 110, s. 3, stating that it was essential that the order should be obtained before three o'clock, until which hour a Judge would not be at Chambers: and he submitted, that the language of the statute, "shall shew to the satisfaction of a Judge of the superior Courts," &c., would include any one of the learned Judges sitting here, who would now look at the affidavits.

The Court, however, thought that the application could only be made to a Judge out of Court, or sitting alone; and shortly afterwards, all the Barons having retired for a short time except *Gurney*, B., that learned Judge read the affidavits, and granted the order.

BLACKWELL v. ALLEN.

A rule obtained on an affidavit the jurat of which is without date, will hereafter be discharged *with costs*.

HUMFREY had obtained a rule in this case to set aside the taxation of costs (on a rule to compute), and the judgment and execution thereon, for irregularity, with costs, on the ground that a copy of the bill of costs had not been delivered together with the notice of taxation, pursuant to the rule of this Court, M. T. 1 Will. 4, s. 10.

Corrie shewed cause, and objected that the jurat of the affidavit on which the rule was obtained had no date, and contended that for this defect the rule ought to be discharged *with costs*; citing *Cooper v. Archer* (a), and *Houlden v. Fasson* (b).

(a) 12 Price, 149.

(b) 6 Bing. 236.

Humfrey, contra, urged that these cases were not of recent date, and that the practice had since, notwithstanding the threat held out in them, been otherwise.

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The Court discharged the rule without costs; but intimated that in future the authorities referred to would be strictly acted upon, and the rule would in such cases be discharged *with costs*.

COTTON v. GODWIN.

ASSUMPSIT by the payee against the maker of a promissory note for 15*l.* 9*s.* 4*d.*, dated 23rd of September, 1829, payable on demand, averring a demand made, to wit, on the 3rd of April, 1838.

The defendant pleaded, as to £3, parcel &c., a set-off for money paid, and due when payment of the note was demanded and ever since, concluding with a verification and prayer of judgment; and as to 12*l.* 9*s.* 4*d.*, residue &c., that at the time of the said demand, to wit, on the 3rd of April, 1838, the defendant tendered to the plaintiff the sum of 12*l.* 9*s.* 4*d.*; and that he hath always, from the time of the making of his promise as to 12*l.* 9*s.* 4*d.*, residue &c., been ready and willing to pay that sum, and now brings the same into Court, &c.; concluding with a verification and prayer of judgment. Replication to the first plea, a traverse that any set-off was due at the time of the commencement of this suit, on which issue was joined: and to the second plea, that

Assumpsit by payee against maker of a promissory note for 15*l.* 9*s.* 4*d.*, payable on demand; averring a demand on a particular day. Plea, as to £3, parcel, a set-off due at the time when the note was demanded, and ever since; concluding with a verification and prayer of judgment: and as to 12*l.* 9*s.* 4*d.*, residue, that at the time of the demand the defendant tendered the plaintiff 12*l.* 9*s.* 4*d.*, and hath always, from

the time of making his said promise, as to 12*l.* 9*s.* 4*d.*, been ready and willing to pay that sum, and now brings the same into Court, &c.; concluding with a verification and prayer of judgment. Replication to the first plea, a traverse that any set-off was due at the commencement of the suit, on which issue was joined; to the second, that, before the making of the alleged tender, and before and at the time of the making of the demand and refusal hereinafter mentioned, a larger sum than 12*l.* 9*s.* 4*d.*, to wit, 15*l.* 9*s.* 4*d.*, including the said sum of 12*l.* 9*s.* 4*d.*, was due upon the note; and that before the said tender, the plaintiff demanded payment of the said sum of 15*l.* 9*s.* 4*d.*, which so included the 12*l.* 9*s.* 4*d.*, but the defendant refused to pay the 15*l.* 9*s.* 4*d.*; and that at the time of such demand and refusal, no set-off or other just cause for non-payment thereof existed:—*Held*, on special demurrer, that the replication was good.

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before the making of the alleged tender, and before and at the time of the making of the demand and refusal hereinafter mentioned, a larger sum than 12*l.* 9*s.* 4*d.*, to wit, 15*l.* 9*s.* 4*d.*, including the said sum of 12*l.* 9*s.* 4*d.*, was due upon and by virtue of the said promissory note: and that before the said tender, to wit, on the 1st of January, 1835, the plaintiff demanded payment of the said sum of 15*l.* 9*s.* 4*d.*, which so then included the said sum of 12*l.* 9*s.* 4*d.*; yet the defendant did not then pay the said sum of 15*l.* 9*s.* 4*d.*, or any part thereof, but then wholly neglected and refused to pay the said sum of 15*l.* 9*s.* 4*d.*, and every part thereof; and that no set-off or other just cause then existed for non-payment of the said 15*l.* 9*s.* 4*d.*, or any part thereof. Special demurrer, and joinder in demurrer.

The case was argued in Trinity Term, by

Wightman, in support of the demurrer.—The replication of a prior demand of a larger sum is bad. The plaintiff should have replied a prior demand of the precise sum tendered, and no more: *Rivers v. Griffiths* (a); or he should have traversed the tender, if he meant to dispute its sufficiency or validity. The replication is also bad for duplicity; for the first and second pleas together constitute but one answer to the note; and the plaintiff, therefore, should not have traversed the set-off, and also endeavoured to avoid the tender: either would have been sufficient.

Cole, contra.—*Rivers v. Griffiths* merely decides that if, in answer to a plea of tender, the plaintiff does reply a prior demand of the sum tendered, and issue be taken thereon, he must *prove* a prior demand of the precise sum, and no more; but it is no authority for the proposition that the plaintiff *must reply* a prior demand of the precise sum.

(a) 5 B. & Ald. 630; 2 D. & R. 215.

This action being upon a note for 15*l.* 9*s.* 4*d.*, payable on demand, the cause of action thereon accrued immediately, or at all events when payment of the note was first demanded. There may have been several demands; but the plaintiff could not properly, in his declaration, anticipate the defendant's case by alleging that he demanded payment before any tender was made: *Hollis v. Palmer* (a). The replication admits that a tender of 12*l.* 9*s.* 4*d.* was in fact made; but at the same time shews also, that it was not made until after the cause of action had accrued. The prior demand of the whole amount due on the note was undoubtedly good. If there had been no such prior demand as alleged, the defendant might have traversed it. If there was such prior demand, a subsequent tender of the whole amount of the note, with lawful interest thereon, would have been bad: *Hume v. Peploe* (b), *Poole v. Tumbridge* (c). Therefore a subsequent tender of part, without interest, must necessarily be bad as to that part, for damages thereon had then accrued. As to the second point, there is no duplicity, for the first and second pleas are quite distinct; the replications to them are also quite distinct; and the defendant has joined issue on the first, and demurred to the second. The first and second pleas *ought* to have been comprised in one, and for that reason are substantially bad in their present form, the cause of action on the note being entire.

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Wightman, in reply.—The plaintiff in his replication alleges, that, at the time of making his prior demand, no set-off was due. That could not be traversed, or if traversed, would raise the same question as under the first plea.

The Court suggested, that each party should amend

(a) 2 Bing. N. C. 713; 3 Scott, 265.

(b) 8 East, 168.

(c) 2 M. & W. 223.

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without payment of costs, and the case stood over accordingly. This, however, not being assented to on the part of the plaintiff,

PARKE, B., now delivered the judgment of the Court.— This case, which was argued last term, stood over for the counsel on both sides to consider whether the pleadings should be amended. It has been intimated to us that the counsel for the plaintiff declines the proposal, and requires the opinion of the Court upon the pleadings as they stand. We think the plaintiff is entitled to our judgment. [His lordship stated the pleadings, and continued.] The replication to the first plea, that of set-off, is correct, though it takes no notice of the averment that the sum claimed by the defendant was due *at the time of the demand* mentioned in the declaration; that circumstance was wholly immaterial on a simple plea of set-off, where the defence is merely the existence of a cross demand, as this is, which is a plea as to the sum of £3 only. Indeed, upon looking more carefully at the pleadings, the replication to the first plea is not demurred to.

It is unnecessary to decide whether the second plea, which is a plea *to part* of an entire sum due on a promissory note, of a tender of that part only, is bad, without shewing in the same plea, in some way, that it was all that was due at the the time; as we are clearly of opinion that the replication to that plea is good. The principle of the plea of tender is, that the defendant has performed, so far as he could perform, his part of the contract, by being always ready to pay the debt, and actually offering to do it; but this replication shews that there was a time when the defendant was not ready to perform his part, viz. when the demand was made of the whole amount of the note, at which time he ought to have been ready to pay the whole, as the whole was then due, according to the averments in

the replication, which must be taken to be true on this demurrer. That being so, a subsequent tender of part was unavailing. Our judgment must therefore be for the plaintiff.

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Judgment for the plaintiff.

ACEY and Another, Executors of SIMPSON, v. FERNIE,
Secretary to the BRITISH COMMERCIAL INSURANCE CO.

THIS was an action brought, under the direction of the Court of Chancery, to recover the sum of £400, the amount of an insurance with the British Insurance Company on the life of Charles Harper Simpson, on the 16th of March, 1831, for a period of seven years, at an annual premium of 5*l.* 19*s.* 8*d.* The first count set out the policy, and then averred the payment of the premiums on the 15th day of March (the day on which it was due) in every subsequent year during the life of the assured, to wit, on the 15th day of March, 1832, and on the 15th day of March, 1833; and that the assured died on the 14th of April, 1833. The second count was similar to the first, except that it alleged the assured to have failed in the payment of the premium on the 15th of March, 1833, and averred that he had afterwards paid the sum of 5*l.* 19*s.* 8*d.*, the amount of such premium, on the 12th day of April in the same year, when the Company accepted it, and agreed that the policy should be of like force and effect as if the premium had

Upon a policy of assurance on the life of A., the premium became due on the 15th of March, but was not paid until the 12th of April, when the country agent of the Insurance Company, through whom the insurance had been effected, gave a receipt for the amount of the premium. The instructions given by the Company to the agent were, that the premium on every life policy must be received within fifteen days from the time of its becoming due; if not paid within

that time, that he was to give immediate notice to the office of that fact, and in the event of his omitting to do so, that his account would be debited for the amount, after the fifteen days had expired. No notice was given to the Company of the non-payment of the premium within the fifteen days; it was therefore entered in their books as paid on the 15th of March, and the agent was debited for the amount:—*Held*, first, that the mere debiting the agent with the premium could not be considered as a payment to the Company by the assured; secondly, that as the agent had no authority to contract for the Company, the fact of his receiving the money after the expiration of the fifteen days, and the entry in the Company's books, debiting him with the amount, were no evidence of a new agreement between the Company and the assured.

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been paid at the proper time. The defendant pleaded to the first count, that the premium was not paid in every subsequent year on or before the 15th day of March, to wit, on the 15th day of March, 1833. To the second count he pleaded, 1st, non assumpsit; 2ndly, that the 5*l.* 19*s.* 8*d.* were not paid on the 12th of April, as and for the premium for the year commencing on the 16th day of March, 1833; 3rdly, that the promise alleged to have been made on the 12th of April, 1833, was obtained by fraud and covin. Issue was joined on these pleas; and at the trial before Lord Abinger, C. B., at the London Sittings after last Term, it appeared that the insurance had been effected through the Company's agent at Hull; and that the premium payable on the 15th of March, 1833, was not in fact paid until the 12th of April, on which day the money was paid to the agent, who then gave the following receipt:—

“British Commercial Life Assurance Company, London. Receipt, 3258.—Sum assured, £400—Policy, 3298.

“Received the 12th day of April, 1833, of Mr. Charles Harper Simpson, the sum of 5*l.* 19*s.* 8*d.*, being the premium of insurance on four hundred pounds for one year from the 15th day of March, 1833, on the life of himself.

“5*l.* 19*s.* 8*d.* (Signed) GEO. GREENWOOD.”

At the bottom of the receipt was the following:—

“If this receipt be not taken up within fifteen days from the day the premium becomes due, it must be returned to the office; as, after that period, the insurance being cancelled, the several receipts will be of no avail. (See conditions of insurance in the printed proposals of the Company.)”

The instructions given by the Company to their agent, Greenwood, were, inter alia, “That the premium on every life policy must be renewed within fifteen days at the latest from the time of its becoming due; and if not paid within that time, you are to give immediate notice to the office

such fact; and in the event of your omitting to do so, your account will be debited for the amount after the fifteen days are expired, and you will be held responsible to the Directors for the same." No notice was given to the Company by Greenwood of the non-payment of the premium within the fifteen days after it became due; and, in accordance with the usual practice of the office, the premium was entered in the Company's books as paid on the 15th of March, and the agent was debited for the amount. The Lord Chief Baron directed a verdict for the defendant, giving the plaintiffs leave to move to enter the verdict for them, on such of the issues as the Court should think fit.

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Sir *F. Pollock* now moved accordingly.—The evidence shewed that there was payment of the premiums according to the regulations established by this Company; and it was not necessary that the premium should be paid on the day it became due, without reference to the practice of the office. It is sufficient if it were paid according to the ordinary rules of the office. Here the Company, having received no notice from their agent that the premium had not been paid, entered it as paid in their books on the day it became due; they are bound by that entry, and cannot be allowed afterwards to say that it was not so paid. [*Parke, B.*—The question is, whether that would not be evidence of a new contract.] It goes further than that. The fact of the Company having debited the agent with the premium, was evidence that they had taken his responsibility for the amount, and accepted it as paid on that day. [*Parke, B.*—The agent was not debited with the money until after the expiration of the fifteen days, when the contract was at an end.] The money was paid to the agent, and a receipt given, without any objection being made, or anything to shew a repudiation of that mode of dealing,

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and this was evidence to go to the jury that the money was to be considered as actually paid, according to the practice of the office. There was nothing to prevent Greenwood from paying for the assured; and if the Company adopted that payment, it must be considered as a payment on the proper day. The arrangement was, that if the agent did not give notice, he should be debited with the amount; he was debited with it, and some days afterwards the money was paid to him. That was in effect a payment to the Company, who must take the consequences of having entered into such an arrangement. [Lord Abinger, C. B.—It was not an arrangement entered into with the assured, but between the company and their agent; how can the assured take advantage of that?] Suppose the agent had told the assured that he would pay the premium for him, and he should repay him when convenient to him, and he relied upon his doing so: surely the assured ought not to suffer.

Then as to the second count.—Although an agent may be liable to his principal where he exceeds his authority, the principal is bound by his act. Where there is a general agent, who has in fact a limited authority only, but that is unknown to the person with whom he enters into a contract, the principal must look to his agent for any breach of his instructions, but the principal is bound if the agent exceeds his authority. [Lord Abinger, C. B.—What an agent does within the scope of his general authority binds his principal; but where there is a limited authority only, then what he does must be shewn to be within the scope of that authority. There was here no evidence to go to the jury of a new contract.]

LORD ABINGER, C. B.—The Court concurs with me in thinking the verdict must be supported, and this rule therefore cannot be granted. Sir *Frederick Pollock* says very

truly, that on the trial I entertained an impression somewhat favourable to his view of the case; but that was at the time when we were considering whether the agent of the Company might not be made the agent of the assured; and in that view of the case, if it were understood that payment was to be made by the agent, and there was an agreement on his part to advance the money, then it might be considered as a payment on the day when it became due; but there was no evidence to shew that Greenwood was the agent of the assured, and I was of opinion that he could not be so considered. It seems to me that the provision, that he should be debited as if the premium was paid, was to operate as a penalty on him; but does not authorize third persons to take advantage of that which was a mere private arrangement between the Company and the agent, for the purpose of insuring the due payment of all monies which were to be received by him. The first count states that the premium was paid at Hull when due, whereas it was not so. Then as to the second count, there was no evidence of any new contract having been made, nor was there in any sense any authority in the agent to make a new contract under these circumstances with the persons assured. I think there cannot be a rule.

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PARKS, B.—I entirely agree in the view taken of the case by my Lord Chief Baron. With regard to the latter point, that appears to me to be altogether out of the question; because the very receipt itself shews that Greenwood had no authority, as agent, to make a bargain binding the Company to a new contract on the terms of the old contract, but varying the time of payment. Greenwood is not the general agent of the Company; he is merely an agent with limited powers, to receive premiums; he had authority to bind the Company in respect of that money, as if it was paid to the Company itself; but he had no other power,

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and therefore it seems to me that the payment made to Greenwood, and for which he gave a receipt, dated the 12th of April, is no proof of an agreement on the part of the Company to enter into and make a new policy of assurance on the terms of the old one, varied only as to the time at which the premiums were to be paid. The memorandum on the back of the receipt, is a memorandum made by the Company, and shews that, unless the money was paid in fifteen days, the policy was at an end altogether. It is impossible to consider the debiting of the agent with the amount of the premium as a payment on the original day, according to the allegation in the first count: the only question is, did the Company mean to make themselves liable as on a new contract? It seems to me that they did not, and that the meaning of the transaction was merely to keep their agents right, and in case of neglect to be able to come upon them for the amount of the premium by way of penalty; but they did not mean thereby to make themselves liable for the amount of the policy. It is only on the ground that they became liable upon a new contract, that anything can be made of the case on the part of the plaintiff. It appears to me that this was purely a mode of keeping their own agents in order, by holding over them *in terrorem* that they should be responsible for the amount of money not received. I think, therefore, that the verdict is right, and ought not to be disturbed.

GURNEY, B., and ROLFE, B., concurred.

Rule refused.

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BECKETT and Others v. DUTTON.

THE declaration was on a promissory note for £250, made by the defendant, dated the 9th of November, 1838, payable to the plaintiffs, or their order, on demand, for value received. The defendant pleaded that he did not make the note. At the trial before *Rolfe*, B., at the last York Assizes, the note, on being produced in evidence, turned out to be a joint and several promissory note for £250, made by the defendant and his wife, dated the 6th of November, 1837, payable twelve months after date, with interest. It appeared that it was given in consideration of an advance of the sum of 237*l.* 10*s.* to the defendant's wife, and there was no proof of the existence of any other note between the parties. The learned Judge, on the application of the plaintiffs' counsel, allowed the record to be amended, so as to correspond with the note, and then directed a verdict for the plaintiffs, giving the defendant leave to move to enter a nonsuit, if the Court should think the amendment ought not to have been made.

Declaration on a promissory note for £250, made by the defendant, dated the 9th of November, 1838, payable to the plaintiffs or their order on demand. Plea, that the defendant did not make the note. The proof at the trial was of a joint and several promissory note for £250, made by the defendant and his wife, dated the 6th of November, 1837, payable twelve months after date. There was no proof of any other note between the parties.—*Held*, that this was a variance properly amended at *Nisi Prius*, under the 3 & 4 Will. 4. c. 42, s. 23.

W. H. Watson now moved accordingly, and contended that the learned Judge, in permitting this amendment, had exceeded the powers intended to be given by the stat. 3 & 4 Will. 4, c. 42, s. 23, in cases of variance.—This was a material variance in substantial parts of the note, and the defendant has been prejudiced by the amendment. The note produced differs in its date, in the parties to it, and in the period of its duration, from that declared upon. Suppose the defendant had suffered judgment by default to the declaration, that judgment would not be available to him in a subsequent action by a third party upon this note. Besides, the note was for £250, when it appears

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that the actual sum due was 237*l.* 10*s.* only, and the defence might have been that the transaction was usurious, which could not have been pleaded without averring that the note was different from that declared on. [*Alderson, B.*—How could there be any defence of that kind? the difference between the two sums is not greater than the lawful interest on the 237*l.* 10*s.*] At all events, this is a mistake which could have arisen only from great negligence, and an amendment in such a case tends only to encourage it.

PARKE, B.—I do not see that any real hardship or prejudice has been done to the defendant by this amendment. It is not pretended that there is more than one promissory note in existence between these parties, and the sum, as well in the note declared on as in that proved in evidence, is substantially the same, and became due at the same time. It is clearly a mere misdescription. As to the usury, no such thing appears; and if it really existed, it might have been pleaded to the note as a set out in the declaration, without prejudice to the defence. It seems to me that the amendment was a very proper one.

ALDERSON, B.—It appears to me that this is just the case in which the legislature intended that the discretionary power of amendment should be exercised.

GURNEY, B., and ROLFE, B., concurred.

Rule refused.

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THE GOVERNOR AND COMPANY OF THE BANK OF ENGLAND
v. JAMES REID and JOHN REID.

THIS was an action to recover from the defendants a balance of 2871l. 14s., due in respect of several foreign bills of exchange for upwards of £7000, drawn by the defendants, payable sixty days after sight, and indorsed to the plaintiffs. The action was commenced by *capias*, before the stat. 1 & 2 Vict. c. 110 came into operation. The affidavit to hold to bail stated the amounts and particulars of the bills, and, as to some of them, that they had been refused acceptance and payment by the drawees; as to others, that they had been refused payment by the acceptors. A writ of *exigi facias* was issued on the 12th of February, 1838, and the plaintiffs proceeded to outlawry against both the defendants, and a special *capias utlagatum* was issued on the 10th of May, 1838, under which goods of the defendants were seized and sold, out of the proceeds of which the rest of the plaintiffs' claim was satisfied. In this term, *Crompton* obtained a rule to shew cause why, upon entering a common appearance, the proceedings to outlawry should not be reversed. The affidavit of the defendant, James Reid, in support of the rule, sworn 20th of October, 1840, stated that the defendants had continually resided in the United States for five years last past (except as after mentioned), where they had carried on business as commission and general merchants in copartnership; that in June 1837, the defendant, John Reid, came to England to lay the state of his affairs before their creditors, and on the 27th of September, 1837, left England and returned to the United States; that in August 1839, he again proceeded to England, and remained there about a month, when he returned to the

Under a *capias utlagatum*, issued in February 1838 (in an action on foreign bills of exchange for upwards of 7000l.), goods of the defendants, who were merchants carrying on business in the United States, were seized and sold; out of the proceeds of which the plaintiffs received upwards of £4000. On application to reverse the outlawry, the Court directed that it should be reversed on payment of all costs, and on entering a common appearance, and that the money received under the levy should be invested in Exchequer bills, and deposited with the officer of the Court, to abide the event of the suit.

Where, on an application to reverse an outlawry, the Court see sufficient grounds for believing that the defendant does not intend

to remain in this country, and that the circumstances are such as that a Judge would order a *capias* to issue under the 1 & 2 Vict. c. 110, s. 3, it seems that they will still impose on the defendant the condition of putting in special bail.

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United States to attend to his business, where he had ever since remained; that the defendant James Reid came to England for the purpose of his general business in August, 1836, and in the September following returned to the United States, and remained there until August, 1840, when he left the United States for this country, and arrived in England on the 9th of September: and that both the defendants were abroad when the writ of exigent was issued against them. The affidavit in opposition to the rule stated, that on the 20th of July, 1839, a summons was taken out by the defendants' attorney, calling on the plaintiffs to shew cause at chambers why the outlawry should not be set aside; but that on the 25th of July, the plaintiffs' attorneys received a letter from the defendants' attorneys, stating that they had *that morning* received instructions from their clients not to proceed with the application.

Sir *F. Pollock* (with whom was *Bayley*), shewed cause against the rule, and contended that, as all the proceedings were regular, the Court ought not to set aside the outlawry on the defendants' merely entering a common appearance, but would impose upon them such further terms as they should deem equitable; and that the defendants ought to be called upon to pay the costs and put in bail, and the plaintiffs be permitted to retain the money received under the execution, in part satisfaction of their debt. He urged that the stat. 1 & 2 Vict. c. 110 did not apply to this case; because here the defendants avowed that their permanent residence was abroad, and therefore, if they were now within the jurisdiction, an affidavit might well be made that they were about to leave England: and he cited *Matthews v. Erbo* (a), in which, under similar circumstances, the Court refused to interfere at all on motion, but left the defendant to his writ of error.—The Court then called on

(a) 1 Ld. Raym. 349; Carth. 459.

Cresswell and *Crompton*, contra.—If the affidavit to hold to bail appears to be so substantially defective that the defendants, if they had been arrested on it, would have been entitled to their discharge on entering a common appearance, it cannot be made the foundation of proceedings to outlawry, and they are entitled to reverse the outlawry on entering a common appearance. Here the affidavit does not shew, as to all the bills, that they are overdue: it merely states that they have been accepted, and that payment of them has been refused by the acceptor; but it does not state when they were accepted, and therefore discloses no means of computing the sixty days' sight, so as to shew that they were overdue. And where an affidavit to hold to bail is bad as to part of the sum for which the arrest is made, it is bad altogether, and the defendant is entitled to his discharge: *Kirk v. Almond* (a). [*Parke*, B.—That case has been disapproved of, and is acted on only where the part which is good cannot be separated from that which is bad (b). Here this affidavit is undoubtedly good as to some of the bills.] At all events, it is clear that these proceedings would be bad on error, as the defendants were abroad when the exigent was awarded. The plaintiffs, therefore, are not in strictness entitled to the costs of outlawry; *Ibbotson v. Fenton* (c); and as to the condition of putting in bail, since the stat. 1 & 2 Vict. c. 110, it is not in the ordinary course to require special bail to be put in, on the reversal of an outlawry. *Harvey v. O'Meara* (d) is expressly in point. There the action was commenced, and an *exigi facias* was awarded, and the proceedings in outlawry were completed, during the defendant's absence abroad, and before the passing of the statute; and on an application, after its passing, to set aside the outlawry, and discharge the defendant from custody on entering a com-

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(a) 2 C. & J. 354.

(c) 6 Ad. & Ell. 772.

(b) See *Counce v. Rigby*, 3 M. & W. 67.

(d) 7 Dowl. P. C. 725.

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mon appearance and on payment of costs, the Court made the rule absolute. It is said that, under the circumstances, this case is such as that an affidavit might be made, on which a Judge would issue a *capias* under the statute. Even if this were so, that ought to be the subject of a distinct application: if the condition of putting in bail is imposed now, the defendants are precluded from answering, and shewing that they do not intend to leave the country.

Nor are the plaintiffs entitled to retain the money levied under the *capias utlagatum*. The proceedings being merely for the purpose of compelling an appearance, the case is similar to that of money paid into Court in lieu of bail; when the party enters the appearance, he takes it out again. All that the plaintiffs can demand is to be put in the same condition as when the proceedings in outlawry were commenced.

Lord ABINGER, C. B.—It appears to me that this rule cannot be absolute except upon payment of costs; and further, that under the special circumstances of the case, we should be doing great injustice if we insisted on the plaintiffs' returning the money which has been levied: more especially as the majority of the Court think that we ought not also to impose the terms of putting in special bail. The Court all think that the money should remain to be subject to the final decision of the cause; because, if the outlawry be reversed and the money returned, the defendants may go abroad again, and so prevent the plaintiffs from obtaining execution. The only remaining question therefore is, whether the defendants ought to be compelled to put in bail. I should myself have thought the particular circumstances of the case were sufficient to justify the Court in requiring them to do so. The proceedings in outlawry were commenced in 1837; the seizure took place in May 1838; in July 1839, an application is

made to set aside the outlawry, which is abandoned a few days afterwards, it being clear that the defendants, or one of them, were then in this country. Then it is not until this present month of November, 1840, that this application is made to the Court. All the facts speak plainly to my mind, that the application was delayed until the defendants should have gone away to America, so that the Bank would have no opportunity to apply for a *capias* under the statute. I admit the general principle, that, since the 1 & 2 Vict. c. 110, a defendant is entitled to set aside his outlawry without putting in special bail; but here I think the circumstances afford sufficient ground for concluding that the defendants, having been in England, have gone abroad in order to make this motion more conveniently, and that their delay has given them the means of getting away, and has deprived the plaintiffs of the opportunity of obtaining special bail. I think it must be inferred that they intended to go abroad; and that it is a case in which a Judge would have made an order for a *capias* to issue. This is, however, a matter of no great importance, as we are all agreed that the money must remain until the action is determined.

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PARKE, B.—There is no doubt whatever that it is the constant practice of the Court, on motion to set aside an outlawry, to impose such terms as they think reasonable, this being an application to the equitable jurisdiction of the Court. If the defendant chooses to resort to a writ of error, he is at liberty to do so; but if he applies to the Court, the invariable practice is to impose on him the terms of paying costs, unless he satisfactorily makes it out that the plaintiff vexatiously proceeded to outlawry, by an abuse of the process of the Court, knowing that the defendant was not subject to outlawry. That is not the present case; so that, at all events, the defendants must pay all the costs. The next question is as to the money levied under the

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outlawry; and under the circumstances, it appears to me that we ought not to require the plaintiffs to refund it, but that the equitable course is, that it should remain in medio, to abide the decision of the cause. With respect to the question of bail, I think the defendants ought not to be required to put in special bail. Nothing turns upon the validity of the affidavit of debt, which appears to me to be perfectly correct. But since the stat. 1 & 2 Vict. c. 110, and the decision of my brother *Coleridge* in *Harvey v. O'Meara*, the general rule of the Courts ought to be, to discharge a defendant from outlawry on entering a common appearance, and on payment of costs. If the plaintiff says that he has lost an opportunity of arresting the defendant, he should make that clearly appear by affidavit. I think that it is not so here; non constat but that both these defendants are now within the jurisdiction, and if so, the plaintiffs may have an opportunity of applying to a Judge for a *capias* against them, provided they are about to leave England. Inasmuch, therefore, as it does not appear but that the plaintiffs have still an opportunity of holding the defendants to bail, I think we ought to abide by the general rule.

GURNEY, B.—I am of the same opinion. I think the costs must be paid, and that the money should be retained to abide the event; but I agree with my Brother *Parke*, that a sufficient case is not made out to require special bail.

ROLFE, B.—I am of the same opinion. The only doubt I had was as to the last point: I thought at first that sufficient matter was disclosed to hold the defendants to bail, but I have now come to a different conclusion. All that appears upon the affidavit is, that the defendants are persons residing abroad, and now in England; at least it is not shewn that they have left England.

The rule was made absolute for reversing the outlawry, on entering a common appearance, and on payment of the costs of outlawry and of this application; the defendants to invest the money received by them in Exchequer Bills, and deposit the same with the officer of the Court, to abide the event of the suit. The defendants to have a week to draw up the rule; and if not drawn up within that time, the rule to be discharged with costs.

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INDEBITATUS assumpsit for work and labour and materials, goods sold and delivered, and on an account stated. The defendant pleaded, except as to 63*l.* 13*s.*, (which was paid into Court), non assumpsit, and also other pleas which it is not necessary to state. At the trial before Gurney, B., at the last assizes for the county of Essex, the following appeared to be the facts of the case:—

The corporation of Henley-on-Thames being about to build a house for the defendant, on a farm which he occupied as their tenant at West Tilbury, requested the defendant to take the necessary steps for that purpose. He accordingly applied to one Rowland, a bricklayer, to build the house. Rowland undertook it, and engaged the plaintiff to do the carpenter's and other work. A written contract was entered into between Rowland and the corpor-

R. having undertaken, by a written contract, to build for the Corporation of Henley a house on a farm occupied by A., engaged S. to do the carpenters' work; and the following agreement was made and signed by R. and S., and witnessed by A:—
"It having been arranged that A. shall build a new house on the farm occupied by Mr. A., it is hereby agreed and understood between the said

R. and S., that S. shall do all the carpenter's work, &c. under the inspection and control of the said A., and that the amount of the said work shall be paid by Mr. A. to S. only, and that this agreement shall be his guarantee for so doing." On the same day, A. wrote to S. as follows:—"It having been agreed that R. shall build a new house on the farm occupied by me, and that, by an agreement this day shewn me between you and S. you are to do the carpenter's work, &c., and that the payment, when done, is to be made by me to you, and to no other person, according to plan and specification, I hereby undertake to pay the same, by having a proper discharge."—*Held*, that S., having done the work, could not maintain an action of indebitatus assumpsit for work and labour against A. for the value of it.

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ation, to which the plaintiff was no party, but was aware of its contents. After it had been signed by Rowland, the following memorandum of agreement was made between Rowland and the plaintiff, and witnessed by the defendant:—

“Memorandum made this day between Samuel Sweeting, of South Ockendon, in the county of Essex, carpenter, and Isaac Rowland, of the same place, bricklayer. It having been arranged that the said Isaac Rowland shall build a new house at the farm occupied by Peter Asplin, Esq., called Gun-Hill Farm, in the parish of West Tilbury, it is hereby agreed and understood between the said Samuel Sweeting and Isaac Rowland, that Samuel Sweeting is to do and perform all the carpenter’s, joiner’s, painting, glazing, ironmonger’s work, and all the chimney pieces wanting, in a proper manner, and also the stonemason’s and slater’s work, and find materials for the above works, under the inspection and control of the said Peter Asplin, and the person that shall be appointed to inspect and survey the work, and by no other person. And it is further agreed and understood between the said Samuel Sweeting and Isaac Rowland, that the amount of the said work of the said Samuel Sweeting *shall be paid by Mr. Asplin to Samuel Sweeting only, and that this agreement shall be his guarantee for so doing.* Witness our hands this 23rd day of February, 1839.

“Witness, PETER ASPLIN.

“ISAAC ROWLAND.

“SAMUEL SWEETING.”

On the same day, the defendant wrote and sent the following letter to the plaintiff:—

“West Tilbury, February 23, 1839.

“Sir—It having been agreed that Mr. Isaac Rowland, of South Ockendon, bricklayer, shall erect and build a new house on the farm occupied by me, called Gun-Hill Farm,

in this parish, and that, by an agreement this day shewn me, between you and the said Isaac Rowland, dated this day, you are to do and perform the carpenter's, joiner's, glazing, ironmonger's, stonemason's, and slater's work, and all the chimney pieces wanting for such work; and that the payment, when done, is to be made by me to you, and to no other person, according to plan and specification, *I hereby undertake to pay the same, by having a proper discharge.* I am, Sir, &c.

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"To Mr. S. Sweeting, carpenter, PETER ASPLIN."
"South Ockendon."

The work mentioned in the above agreement was proved to have been done by the plaintiff.

It was contended for the defendant, that upon these facts, Rowland, and not the defendant, was the original debtor to the plaintiff, and that this action of indebitatus assumpsit could not be maintained. The learned Judge, however, thought that, taking the two documents together, the defendant had entered into an original undertaking, and had made himself the principal debtor to the plaintiff: and under his direction a verdict was found for the plaintiff, damages 157*l.* 10*s.* 10*d.*

Platt having obtained a rule nisi for a new trial, on the ground of misdirection,

Thesiger and *Gurney* shewed cause.—The only question is, whether the undertaking of the defendant amounted only to an agreement to pay the plaintiff in default of Rowland's paying him, or whether it was not an absolute agreement by the defendant to pay. And taking the two papers together, which are to be considered as forming one contract, although they are not drawn up with technical accuracy, they are sufficient to shew that the defendant, who was to derive benefit from the work, entered, not

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into a mere guarantee, but into an original undertaking. There is nothing in the agreement between the plaintiff and Rowland which creates an original liability in Rowland, and on which he could be sued: it appears to amount to this, that as to the work therein mentioned, the plaintiff shall be put in the place of Rowland, and be paid for it by the defendant instead of by Rowland. The case resembles that of *Simpson v. Penton* (a). There the plaintiff introduced the defendant to an upholsterer, and in his presence asked the upholsterer if he had any objection to supply the defendant with some furniture; and that if he would, the plaintiff would see him paid at the end of six months. The upholsterer agreed to give this credit, and the plaintiff gave him the order, and the goods were supplied accordingly. It was held that this was an original and not a collateral undertaking by the plaintiff, and that the plaintiff, having paid for the goods at the end of the six months, might recover the money so paid from the defendant. So here, it appears that, before the plaintiff would undertake the work—as there, before the party would supply the goods—he obtained the undertaking of the defendant to pay. *Dixon v. Hatfield* (b) still more resembles the present case. There one West had undertaken to complete the carpenter's work in the defendant Hatfield's house, and to find all materials. West being delayed for want of funds or credit to procure timber, it was supplied by Moore, on the defendant's signing an undertaking in these terms:—"I agree to pay M. for timber to house in Annett's Crescent, out of the money I have to pay William West, if West's work is completed." This was held to be a direct undertaking by the defendant to pay on the completion of the work, and not a guarantee to pay if West should fail. *Andrews v. Smith* (c) is an

(a) 2 C. & M. 430.

(b) 2 Bing. 439; 10 Moore, 42.

(c) 2 C., M. & R. 627.

authority to shew that the undertaking here was not the less an original one, because it was to pay out of the funds that should come to the defendant's hands for Rowland. [Parke, B.—This is in truth nothing more than an agreement between Rowland and the plaintiff, that if money should become due to Rowland from the corporation of Henley, he, the defendant, should pay out of the funds in his hands to the plaintiff instead of to Rowland, and that that paper should be his warrant or authority for so doing. The defendant merely attorns to that agreement, and undertakes to pay, out of the monies due from the corporation to Rowland, directly to the plaintiff. Alderson, B.—Why should Rowland and the plaintiff agree that the defendant should be guaranteed in making the payment, if he is to be personally liable?] The whole work was done for the defendant's benefit, though nominally for the corporation. [Parke, B.—According to your argument, even if Rowland had wholly neglected to perform his work, so that, instead of £500, £250 only was payable, which was swallowed up by the carpenter's work, that must be paid by the defendant. Alderson, B.—In *Andrews v. Smith*, the plaintiff declared on a special contract, and alleged that funds had come to the defendant's hands; here the plaintiff sues generally for work, and labour.] If the plaintiff refused to undertake the work, except on an undertaking by the defendant to pay, how is the case distinguishable from *Simpson v. Penton*? [Alderson, B.—No doubt it is an original undertaking; but the question is, whether it can be the foundation of an action for work and labour.] There is nothing on the face of the agreement to shew that the defendant was to be liable only conditionally on having funds of Rowland's in his hands. If so, the plaintiff is entitled to recover on the general count.

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Ogle, (with whom was *Platt*) *contra*.—First, this was a collateral promise on the defendant's part to pay the debt

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of Rowland ; but secondly, if it was not, the plaintiff cannot recover in this form of action, but should have declared specially. Here the contract with the corporation was signed by Rowland as the only contracting party ; then Rowland and the plaintiff enter into their sub-contract. The argument on the other side is founded altogether on the hypothesis that Rowland did not thereby become liable to the plaintiff ; but it is clear that he did, and that if the defendant had failed to pay the plaintiff, he might have sued Rowland. Again, supposing the plaintiff had done the work improperly, who but Rowland could have sued him ? If this be so, then the subsequent agreement between the plaintiff and the defendant merely amounts to a guarantee for Rowland's debt. If the plaintiff gave credit to Rowland, the defendant's undertaking must be a collateral one ; and if so, the plaintiff clearly should have declared specially : *Milnes v. Sculthorpe* (a). The cases cited on the other side do not apply. In *Dixon v. Hatfield*, and *Andrews v. Smith*, the plaintiff declared on the special contract, averring the facts necessary to shew that the defendant had become liable. The words of the agreement in the present case clearly shew that another party than the defendant was primarily liable ; and that the defendant was only to pay on having funds payable to Rowland, and on having a proper discharge from him.

PARKE, B.—It seems to me that this rule ought to be made absolute. I do not think it is necessary to dispose of the point, whether this is or is not a collateral engagement on the part of the defendant, so as to require a note in writing ; if it were, I should be disposed to doubt, on one construction of these documents, whether it was not a collateral engagement. If it was an undertaking by the defendant to pay so much as should be due from the

(a) 1 Saund. 211.

corporation to Sweeting by Rowland's assignment, then it would be a collateral undertaking for the corporation ; but if it meant that, if the defendant had money in his hands, he was to pay on the assignment of Rowland, then it would not be collateral, and he would be responsible on his simple parol promise. It is unnecessary, however, to decide that point ; here there is a note in writing ; but the question is, whether the plaintiff can recover on a simple indebitatus assumpsit, or whether he ought not to declare upon the special contract: whichever it is, I think, on the true view of the contract in this case, that no such relation is shewn between the plaintiff and the defendant, as that the plaintiff could sue the defendant *for work and labour* ; that there is no such privity between them as to enable him to do so ; but that he could only sue on the special agreement. The question depends on the construction of the agreement proved at the trial. It appears that the corporation had agreed with Rowland that he should build the house for them for a specified sum. Then comes the first memorandum of agreement between Rowland and Sweeting. If the former part of that agreement had stood alone, it would clearly have been nothing more than a sub-contract between Rowland and Sweeting, Sweeting looking to Rowland for payment, and the corporation to Rowland for performance of the work. The memorandum refers to the original agreement which had been entered into between Rowland and the corporation, and which was under seal. The argument for the plaintiff is, in effect, that the parties meant to vary that original agreement under seal, and to constitute a new one, whereby the defendant was to make payment to Sweeting, leaving the original agreement to stand as to the rest ; but the recital shews clearly that they had no such intention, but that they meant it to remain in full force. The agreement is in effect this,—
 “When the contract is fulfilled between me, Rowland, and the corporation, I agree that you, Sweeting, shall receive

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from me so much as is ascribable to your work, which is to be performed under the inspection and control of Asplin and the surveyor, and of no other person; and it shall be paid by him to you only, instead of to me, and this agreement shall be his guarantee for so doing, *i. e.* shall be his warrant, as agent of the corporation, for making that payment." The defendant is the subscribing witness to this agreement; that, however, does not necessarily import that he knew the contents of the instrument. But his own subsequent agreement of the same date shews his knowledge of the former; and he thereby undertakes, that so much of the money which shall be due from the corporation to Rowland, as is properly ascribable to the carpenter's work, shall, on his receiving a proper discharge from Rowland, be paid by him directly to the plaintiff. Therefore, whichever this be, whether a collateral or an original contract, it is a special contract, and does not render the defendant liable as for work and labour; the plaintiff must sue upon the contract itself, *i. e.* according to the terms of the deed, which it is plain none of the parties meant to vary: it must therefore be the subject of a special action, as in *Andrews v. Smith* and *Dixon v. Harrison*.

ALDERSON, B.—I am of the same opinion. I think that, looking at both the documents together, it is clear that this was a special agreement, and not an agreement whereby one party was to do work for the other, and to be paid by him for that work when done. The original contract was by the corporation with Rowland, and there is nothing to shew that the parties intended it should be altered. If the argument for the plaintiff be right, the corporation would not have to pay for the carpenter's work at all. The case depends on the effect of two documents, one signed by the defendant alone, the other by the plaintiff and Rowland, witnessed by the defendant. If there was a direct agreement between the plaintiff and the defendant, why should the

plaintiff and Rowland come to any arrangement at all? Here is an agreement between Rowland and the plaintiff, that the plaintiff shall do the carpenter's work, and shall be paid for it in a particular way, that is, by the defendant to him *only*; why to him *only*, unless the defendant had to pay for it to some one else? It must mean, to him and not to Rowland. Why, again, should there be an agreement between Rowland and the plaintiff, which should be a *warrant* to the defendant to pay to the plaintiff? If the money was due from the defendant to Sweeting, Rowland had nothing to do with the matter; but if it were payable first to Rowland, it would require his signature and warrant to authorize payment to the plaintiff, according to his sub-contract. That construction gives effect to all the words of the instrument; but the other construction gives none to the words I have quoted: as Lord *Ellenborough* once said, it is a complete *jettison* of words. Then the defendant, having that agreement between Rowland and the plaintiff shewn to him, undertakes to pay the plaintiff by having a proper discharge, *i. e.* he undertakes to fulfil that sub-agreement, on having such a discharge as to shew that, as between Rowland and the plaintiff, a debt is due to the plaintiff for the carpenter's work. If the money were due directly to the plaintiff, the payment would of itself be a discharge. The plaintiff, therefore, should have sued on the special contract, and shewn that Rowland had not paid him, and that the defendant had money of Rowland's in his hands.

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GURNEY, B.—The objection at the trial was, that this was not a collateral but an original undertaking. I retain the opinion I then expressed, that it is an original one. The other question is one of some difficulty, and on which I entertain considerable doubt. I yield, therefore, to the opinions of the rest of the Court.

ROLFE, B.—The question which it is necessary to decide

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in the affirmative, in order to sustain this action, is, whether work and labour has been done by the plaintiff for the defendant, to be paid for by the defendant to the plaintiff. I think that that is not the situation of the parties; but that, whether the undertaking of the defendant be an original or a collateral one, it is a special agreement, on which the defendant should have sued specially. The latter words of the second agreement appear to me to be conclusive. When a man enters into a direct agreement with another, he does not say, "I will pay you on having a receipt;" but when it is collateral, on non-payment by a third party, it is natural to express that there is to be a voucher from him.

Rule absolute.

MORLEY v. CULVERWELL.

ASSUMPSIT by indorsee against drawer of a bill of exchange for £100, dated 7th of March, 1840, drawn by the defendant on and accepted by Thomas G. C. Riley, payable to the order of the defendant three months after date; indorsed by the defendant to John Short, and by Short to the plaintiff. The defendant pleaded nine pleas, of which, however, the 7th and 9th only are material to this report.

The 7th plea stated, that after the drawing and accepting of the bill of exchange in the declaration mentioned, and before the delivery of the same to the said T. G. C. Riley, before the same became due and payable, and before the commencement of this suit, and while the defendant, as such drawer as aforesaid, was the holder thereof, and entitled to sue upon the same, to wit, on the 20th of April, 1840,

The drawer of a bill of exchange, before it became due, agreed with the acceptor, that on his giving a certain mortgage security for the amount, he, the drawer, should deliver up to him the bill of exchange as discharged and fully satisfied. The acceptor accordingly executed the mortgage, and received back the bill, uncanceled:—
Held, that the drawer was liable on the bill to a party to whom the acceptor afterwards indorsed it for value, before it became due.

A plea, in such action, that the bill was *paid* by the acceptor before it became due, and afterwards re-issued by him without any new stamp, can be supported only by proof of actual payment in cash, and not by evidence of any arrangement between the drawer and acceptor, whereby the bill was treated as being satisfied.

it was agreed between the defendant and Riley, that he, Riley, should execute a certain indenture, and thereby assign by way of mortgage certain leasehold premises to the defendant, to secure the payment of a large sum of money, to wit, £853, part of which, to wit, the sum of £703, was theretofore lent and advanced by the defendant to Riley, and for part of which Riley, before the said 20th of April, 1840, gave to the defendant certain bills of exchange, drawn by the defendant on Riley, and accepted by him, [stating four bills of exchange, one of which was the bill mentioned in the declaration]; and that the defendant should deliver up to Riley the said four bills of exchange, that is to say, the three bills of exchange in this plea mentioned, and the said bill of exchange in the declaration mentioned, as discharged and fully satisfied by the said T. G. C. Riley. Averment, that in pursuance of the said agreement, the said mortgage was executed by Riley, and accepted and received by the defendant in discharge and satisfaction of the said four bills of exchange, and thereupon the said bills respectively were given up and delivered to Riley, as paid and fully satisfied by him, Riley, the acceptor thereof, and not for the purpose of being transferred, indorsed, or otherwise negotiated; that the said bill in the declaration mentioned was indorsed and delivered by Riley to Short, without any consideration or value for the same, and without any authority or sanction from the defendant, as drawer thereof, and that Short indorsed and delivered it to the plaintiff without any consideration or value for the same, and the plaintiff now holds the same without having given any consideration or value for the same. Verification.

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The 9th plea stated, that the said bill of exchange was and is an instrument or bill liable to the charges and duty imposed by the statute in such case made and provided, and that the said bill afterwards, and after the drawing and accepting thereof, and before the same became due, to wit,

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on &c., was fully paid and satisfied by the said T. G. C. Riley, and was then, to wit, on &c., and after the said bill had been so fully paid and satisfied by Riley, according to the statutes in such case made and provided, without any new stamp, or the payment of any rate or duty chargeable thereon, re-issued by the said T. G. C. Riley. Verification. —To each of these pleas the plaintiff replied *de injuriâ*, on which issue was joined.

At the trial before Lord *Abinger*, C.B., at the last assizes for the county of Surrey, the delivery up of the bills by the defendant to Riley, the acceptor, on his executing a mortgage, was proved as stated in the 7th plea: it appeared also that Riley, before the bill in question became due, indorsed it to Short for a valuable consideration, who also, before it became due, indorsed it for a valuable consideration to the plaintiff. It was not proved that the plaintiff had any knowledge of the circumstances under which the bill had been negotiated by Riley. The learned Chief Baron thought that the 7th and 9th pleas were proved in substance, and directed a verdict on those issues for the defendant, leave being reserved to the plaintiff to move to enter a verdict for him, with £102 damages. *Platt* having obtained a rule nisi accordingly.

Thesiger and *Petersdorff* shewed cause.—The question upon this rule is, not whether the pleas are or are not good in point of law, but whether they were proved in fact. The whole agreement stated in the 7th plea was proved, and that was sufficient to prevent the plaintiff from recovering. Here the acceptor, during the running of the bill, discharged and satisfied it by agreement with the drawer; and it could not afterwards be negotiated by the acceptor, so as to give a valid title to an indorsee. There is a distinction between the payment of a bill of exchange by a party primarily liable upon it, and payment of it by any other party. If it be paid *by the acceptor*, it cannot after-

wards be negotiated at all: if by another party to it, and if by negotiating it, he would make subsequent parties liable upon it, *he* cannot negotiate it; otherwise he may. The agreement of the indorsers of a bill is, that the acceptor shall pay it, or that they in his default shall do so. By his payment of it, that contract is fulfilled. There is no rule of law which says that it is to be paid by the acceptor, at the precise moment when it becomes due. It is in that respect like a bond. Most of the cases on this subject were decided before or without reference being made to the Stamp Act, 55 Geo. 3, c. 184, s. 19, which enacts, that "all promissory notes, bills of exchange, drafts, or orders for money, not hereby allowed to be re-issued, shall, *upon the payment thereof*, be deemed and taken respectively to be thereupon wholly discharged, vacated, and satisfied, and shall be no longer negotiable or available for any purpose whatever." In *Burbridge v. Manners* (a), it was held that a note, which, before it became due, was paid and taken away from the banker's where it lay, and was indorsed, also before it became due, for valuable consideration to the plaintiff, might be recovered upon against the payee. The facts of that case, however, do not appear to be very intelligibly stated; and it was before the stat. 55 Geo. 3, c. 184. [*Rolfe*, B.—The Stamp Act of the 48 Geo. 3, c. 149, was then in operation, and the 55 Geo. 3, c. 184, s. 19, is in terms a re-enactment of the 14th section of that statute.] The true rule is laid down in *Beck v. Robley* (b), and *Callow v. Lawrence* (c), that a bill cannot be indorsed or negotiated after it has been paid, if such indorsement or negotiation would throw a liability on any of the parties who would otherwise be discharged. [Lord *Abinger*, C. B.—Those were cases where the bill was negotiated after it was due. *Parke*, B.—A bill may be negotiated even after

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(a) 3 Campb. 194.

(b) 2 H. Bl. 89 n.

(c) 3 M. & Selw. 95.

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it is due, if no other person be made liable than before.]

Here, however, it is clear that the transaction amounted to *payment* by the acceptor. He is not bound to wait until the bill becomes due before he pays it. Can he then afterwards negotiate it, so as to make the drawer liable? [Parke, B.—The condition of an indorser of a bill payable after date is this, that he is a surety for the payment of it by the acceptor at a particular time and place, on presentment for payment. If the acceptor pays the bill before it is due to a wrong party, he is not discharged. It has been so held in the case of a banker's cheque payable to bearer; if the banker pays it before it is due, he is not protected (a).] There he is doing an act inconsistent with his duty as banker; but there is no such violation of duty in the acceptor paying the bill before it is due, and to the party entitled to receive it. [Parke, B.—But it shews that the obligation of the drawee or acceptor is to pay *at a particular time*. You will find the legal liability of the drawer and indorser of a bill of exchange very clearly expressed by Mr. Justice Bayley in his work on Bills (b).] In *Bartrum v. Caddy* (c), where a note payable on demand was indorsed for the maker's accommodation, and having been deposited in the hands of a creditor of his, was afterwards paid by the maker and re-issued, it was held that it was no longer negotiable, by reason of the stat. 55 Geo. 8, c. 184, s. 19. [Lord Abinger, C. B.—There the note was payable on demand, so that it was over due.] In *Freakly v. Fox* (d), it was held that a promissory note was discharged by the payee and holder of it having made the maker his executor, and that no action could be maintained on it, even by a party claiming by indorsement from the executor.

(a) *Da Silva v. Fuller*, Bayl. on Bills, 326, (5th edit.).
(b) Pp. 43, 156, (5th edit.).

(c) 1 P. & D. 207.
(d) 9 B. & Cr. 130; 4 Man. & R. 18.

But at all events, the defendant is entitled to the verdict on the 9th plea. The stat. 55 Geo. 3, c. 184, does not distinguish between payment made *at* and *before* the maturity of the bill; but the intention of the legislature was, that after a bill had been in any manner satisfied, it should not be re-issued without a new stamp.

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Platt and Peacock, contra.—First, the plaintiff was entitled to recover on the seventh plea. It can never be said that the rights of a bona fide indorsee for value before the bill became due, can be affected by a private arrangement between the drawer and acceptor. This bill was never paid, in a legal sense, at all. The undertaking of an acceptor is to pay the bill at a particular time; and that of the drawer and the indorsers, that he shall pay it *at that time*, or they will be responsible. In pleading, therefore, the obligation of the acceptor is said to be, to pay *according to the tenor and effect of the bill*. Has he satisfied that obligation here? Mere satisfaction of a bill before it is due is not *payment* of it. And the stat 55 Geo. 3, c. 184, s. 19, when it speaks of “the payment thereof,” means not the mere act of payment, but payment according to the tenor of the bill. In the cases cited on the other side, the instrument had been paid according to its tenor and effect, and therefore could not afterwards be negotiated to the prejudice of innocent parties. In *Freakly v. Fox*, the plaintiff must have known that the defendant had no right to indorse the note except as executor, and therefore that it was discharged by making him executor: he thus had notice, that the note was satisfied. It was essential, therefore, to the defendant’s case, in support of the issue on this plea, to prove not only the agreement between himself and the acceptor, but also that the bill was transferred to the plaintiff with notice of it, and without consideration.

Secondly, the 9th plea was not proved. The facts

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proved on the trial did not amount to *payment* of the bill, so as to satisfy the allegation in the plea, that it "was fully paid and satisfied" by Riley. That must mean a payment in money: but this was a mere arrangement whereby the bills were considered as satisfied, on the execution of a mortgage. It is clear that such evidence would not have supported a plea of payment; if it would, it might equally be proved by a release, or by the delivery of a chattel in accord and satisfaction. Neither can there be any *re-issuing* of a bill until it is over due; until then, it is in course of *negotiation*.

LORD ABINGER, C. B.—I am of opinion that this rule ought to be made absolute. On the trial, it struck me that the pleas were substantially proved; but upon consideration I am satisfied that I was wrong. I think, under the circumstances, the 7th plea could not be supported, unless the allegation, that the plaintiff took the bill without any consideration or value, was proved. It seems to me that was an essential part of the plea, in order to make out the defence. As to the last plea, I think it is bad in point of law; but the question now is, whether it was proved or not. It is bad, on the ground that it does not allege a payment in satisfaction of the bill, after it became due. But even supposing that payment by the acceptor in satisfaction of the bill, before it became due, were a good answer in point of law to an action by an indorsee, the plea was not proved; because upon this issue the plaintiff had a right to expect proof of actual *payment in money*, not of a mere accord and satisfaction. If the bill were satisfied otherwise than by payment in money, the plaintiff had a right to expect that the particular kind of satisfaction should be set forth in the plea. Proof of *payment*, therefore, was essential to support this plea; and that not having been given, the defendant cannot maintain his verdict upon it.

With respect to the more general question which arises in this case, I am now satisfied, after some doubt, that the plaintiff is entitled to recover. The defendant, the drawer of the bill, agrees with the acceptor, while it is running, to deliver it up to him, in consideration of his having the security of a mortgage of property of the acceptor; and gives up the bill accordingly, without striking out his name as drawer. Before the bill becomes due, a party who is ignorant of this transaction discounts it for the acceptor; and, before it becomes due, transfers it for value to the plaintiff, who is also ignorant of the transaction. The question then is, whether the discharge of a bill by the acceptor, by an arrangement with the drawer before it is due, can affect the bill in the hands of an innocent holder for valuable consideration. I think it cannot. The contract of the drawer and of each indorser is, that the bill shall be paid by the acceptor at its maturity—not before it is due; that it shall be paid, as Mr. *Peacock* has observed, according to its tenor and effect—that is, when it becomes due. If, upon its being discharged before it becomes due, the drawer inadvertently leaves his name upon the bill, he is but in the ordinary case of a party who has a bill in negotiation with his name upon it, against his intention. It is in the hands of an innocent holder, who has no notice that it has been discharged. Suppose mutual accommodation acceptances to be given, and to be exchanged before they have been negotiated, the names remaining on them;—the parties may circulate them so as to give a title to a *bonâ fide* holder, before they become due; and wherein does this case differ from that? Therefore, a bill is not properly *paid* and satisfied according to its tenor, unless it be paid when due; and consequently, if it be satisfied before it is due, by an arrangement between the drawer and acceptor, that does not prevent the acceptor from negotiating it, or an innocent indorsee for value from recovering upon it. The rule must therefore be absolute.

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PARKE, B.—I entirely concur with the Lord Chief Baron, and think that in this case neither of the pleas was proved. [His Lordship stated the 7th plea.] Undoubtedly, if all the facts alleged in this plea had been proved, they would have amounted to a good defence; because the plaintiff would then have been in the same situation as Short, and Short as Riley; and as to Riley the bill was satisfied. But in order to establish the plea, it was necessary to prove the two allegations which put the plaintiff in the same situation with Riley; viz. that Riley indorsed to Short, and Short to the plaintiff, without value or consideration; whereas it was proved that there was a valuable consideration for both indorsements. The question therefore is, whether the fact of the acceptor having satisfied the bill before it became due, is any defence against a bonâ fide indorsee. I am of opinion that nothing will discharge the acceptor or the drawer, except *payment according to the law merchant*—that is, payment of the bill at maturity: if a party pays it before, he *purchases* it, and is in the same situation as if he had discounted it. The rule is laid down correctly by Lord *Ellenborough*, in *Burbridge v. Manners*, that a payment before a bill becomes due “does not extinguish it, any more than if it were merely discounted;” and that “*payment* means payment in due course, and not by anticipation.” The party who takes a bill before it becomes due has no means of knowing whether payment has been anticipated or not. The 7th plea, therefore, was not proved. As to the cases that have been cited, they are all cases of bills paid at maturity, because they were payable on demand.

With respect to the 9th plea, the question now is, whether it was proved in fact. It is bad in point of law; because the payment mentioned in the Stamp Act must be taken to mean payment by the party liable, at the maturity of the bill, and according to the tenor of it: otherwise there have been many cases wrongly decided. But I

agree that, even assuming the plea to be good, it was not proved in fact. It would be essential, in order to support it, to prove payment of the bill in money, and not merely a satisfaction of it by an agreement such as was proved in this case, which was no payment in the proper sense of the word. On a demurrer to this plea, for stating only that the bill had been "paid and satisfied," without stating the mode of payment, the plea would, I think, have been held sufficient, on the ground that those words would be construed to mean payment in money. It follows that, in order to support that averment in evidence, the proof should have been of a payment in money. Neither of these pleas, therefore, being proved, the rule must be absolute to enter a verdict on those issues for the plaintiff.

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GURNEY, B., and ROLFE, B., concurred.

Rule absolute.

CARNE v. BRICE and Another.

THIS was an issue under the Interpleader Act, directed by *Gurney, B.*, to try whether certain wearing apparel taken in execution under a writ of fieri facias, issued by the plaintiff against the effects of one Richard Morgan, was the property of Richard Morgan or not. The issue was drawn up in this form with the assent of both parties. The plaintiff averred in the declaration, that the said goods and chattels, at the time of the seizure thereof, were the property of Richard Morgan: that averment was traversed by the plea, and issue was joined thereon.

At the trial before Lord *Abinger, C. B.*, at the *Middlesex* sittings after last Easter Term, it appeared that the plaintiff, having recovered judgment in an action against Morgan for the piece of butcher's meat supplied to him,

The property in wearing apparel bought for herself by a wife living with her husband, out of money settled to her separate use before marriage, and paid to her by the trustees of the settlement, vests by law in the husband, and it is liable to be taken in execution for his debts.

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issued a fieri facias thereon, under which the sheriff was proceeding to take in execution certain property then in Morgan's house at Hampstead, where he resided with his wife, when the defendants interfered, and claimed the property as trustees of the wife, on the ground that it had been purchased with money vested in them for her sole and separate use, under the settlement executed previously to her marriage with Morgan. It was ultimately arranged among the parties, that the plaintiff should seize part of the property, in order to raise the question between them, and he accordingly took in execution Mrs. Morgan's wearing apparel, which had been bought by her with part of the money so settled to her sole and separate use. The defendants offered evidence of Morgan's bankruptcy, with a view of shewing that, at all events, the property in the goods was not vested in him, but in his assignees. The Lord Chief Baron rejected the evidence, considering that the only question intended to be raised on the issue was as to the right of the defendants as trustees; and being of opinion that the property in the goods, under the circumstances, vested by law in the husband, directed a verdict for the plaintiff.

In Trinity Term, *Platt* obtained a rule nisi for a new trial, on the ground that, under the issue as framed, the evidence of Morgan's bankruptcy had been improperly rejected; and also on the ground of misdirection,—citing *Jarman v. Woolloton* (a), *Heselinton v. Gill* (b), and *Dean v. Brown* (c). In this Term,

Erle and *Moody* shewed cause.—First, the defendants were not at liberty, under this issue, to set up the *jus tertii*, and defeat the plaintiff by shewing that Morgan had become bankrupt, and therefore that the wearing apparel in question

(a) 3 T. R. 618.

(b) *Id.* 620, n.; 3 Dougl. 415.

(c) 5 B. & Cr. 336; 8 D. & R. 95.

belonged to his assignees, and not to him. The real question intended to be raised between the parties was, whether the property belonged to the trustees, or had vested in the husband. [*Parke, B.*—The form of the issue ought properly to have been, whether the goods were the property of the trustees or not; but, in truth, that is in effect the question upon this issue.] The issue in fact is, whether the goods were liable to be taken in execution as against the defendants, the claimants. Neither the assignees, nor any other persons not parties to this suit, will be barred by the present verdict: *Carter v. Johnson* (a).

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Secondly, the goods were the property of the husband, inasmuch as the money with which they were bought, immediately on its being handed over by the trustees to the wife, and in her hands as a chattel, vested by law in him: à fortiori, the produce of that money by a subsequent contract made by the wife, belonged in law to the husband. In *Rex v. French* (b), it was held that goods bought by a married woman, even when living apart from her husband, on an income arising from property vested in trustees for her separate use, were by law the property of the husband, and must be so described in an indictment for stealing them. The cases relied upon on the other side are distinguishable. In *Jarman v. Woolloton*, stock in trade and furniture were assigned by a wife before her marriage, to a trustee for her separate use, to the intent that she might carry on trade at her own risk and for her own benefit. There the Court held, that the furniture, though removed to the husband's house, was vested in the trustee. Neither is it disputed here, that the property included in the settlement vested in the trustees. So, in *Heselinton v. Gill*, where certain cows, and the produce and increase to arise therefrom, were vested before marriage in trustees, for the separate use of the wife, who carried on the business of a cowkeeper, it was held, that neither the iden-

(a) 2 M. & Rob. 263.

(b) Russ. & Ry. C. C. 491.

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tical cows included in the settlement, nor others bought by the wife with the money produced by the sale of their milk, were liable to be taken in execution for a debt of the husband; upon the ground, as stated by Lord *Mansfield*, that there was no authority to shew that a man may not before marriage put his intended wife in a situation to carry on a separate trade. Here the parties are living in private life together, and no question as to a separate trade arises. In *Sir John St. John's case (a)*, where a woman before her marriage conveyed certain leases to trustees, and after her marriage received the rents, and died, leaving part of them in money, it was agreed, that "if the trustees consent that the wife shall receive the money, as in the case above the contrary does not appear, there the husband might gain the property as husband." That is an authority directly in point for the plaintiff. In *Molony v. Kennedy (b)*, after a separation between husband and wife, the wife invested money acquired from the savings of her separate estate in the names of her trustees, and appointed it by her will; upon her death she left an additional sum undisposed of; and the Vice-Chancellor held, that the husband could not be compelled to take out administration, but was entitled to the personalty undisposed of, *jure mariti*.

Platt, contra.—First, the learned Judge ought to have received the evidence of Morgan's bankruptcy. The only question raised by this issue is, whether the goods were the property of Morgan or not. The plaintiff chose to take the issue in that form; and no equitable construction ought to supersede the strict legal interpretation of it. [Lord *Abinger*, C. B.—No question was ever suggested to the Court or the Judge, as to the goods being the property of the

(a) 4 Vin. Abr., Baron and Fame, (F. 2), p. 48.

(b) 3 Jurist, 793.

assignees. The only question on the interpleader rule was, whether they were the property of the trustees; if they were not, they had no right to interfere.] Still the plaintiff takes upon himself to prove the affirmative of the issue, that they were the goods of Morgan; and as nothing could properly be taken under the execution but that which was his property, that was the legitimate issue to be tried.

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But secondly, this wearing apparel was not the property of Morgan as against the trustees. It is said, that as soon as the wife receives the money for her separate use, it is her husband's. If that be so, it is utterly useless in any case to make a provision for the separate use of the wife; because not only would the husband be entitled to money, when delivered into her hands, but he might even take the food purchased with it from her table. The wife must reasonably have a control over the money, for the purposes of her food and clothing. The clothes are, if the expression may be allowed, part of the machinery by which the separate use is effected. The authorities cited for the plaintiff only go to shew that the husband may reduce the goods into possession, and so make them his: here he did not do so. *Dean v. Brown* is in point for the defendants. All that is to conduce to the separate use and maintenance of the wife, is vested in the trustees. In the case cited from Viner's Abridgment, all that was agreed was, that the husband *might* gain the property as husband—*i. e.* by reducing it into possession.

LORD ABINGER, C. B.—I entertain no doubt in this case, and think the rule ought to be discharged.

PARKE, B.—I quite agree that the trustees had no right to set up the title of the assignees, and that the Lord Chief Baron, therefore, was quite right in excluding evidence of the bankruptcy. This issue is only a proceeding directed for the purpose of informing the conscience of the Court;

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and the only question upon the rule was, whether the trustees had a right to intervene. We shall certainly not grant a new trial, because evidence was rejected which we did not intend should be admissible. My only doubt is, whether, for the purposes of this deed of settlement, the trustees must not be taken to have employed the wife as their agent for the purchase of this wearing apparel; otherwise the object of the settlement may be defeated.

Cur. adv. vult.

On a subsequent day,

Lord ABINGER, C. B., said.—The question in this case was, whether certain wearing apparel, bought by a married woman out of an income settled in the hands of trustees to her sole and separate use, and taken in execution for a debt of her husband, belonged to the trustees or to the husband. I was of opinion that they belonged to the husband and not to the trustees, and consequently that they might be taken in execution for his debt; and the Court are of the same opinion. My brother *Parke* had some doubt, on the ground that possibly the wife might have been the agent of the trustees for the purpose of buying these clothes. The evidence, however, did not shew any such agency: the clothes were bought by the wife with her own money. The rule for a new trial must therefore be discharged.

Rule discharged.

REG. v. THE BISHOP OF EXETER.

The Attorney-General, in the Queen's business, has pre-audience in the Court of of Exchequer over the Postman and Tubman.

AT the sitting of the Court (24th November), the *Attorney-General* moved in this case. The Postman and Tubman claimed pre-audience; but upon the *Attorney-Gen-*

era's stating that it was the Queen's business in which he moved, the Court decided that he was entitled to be heard before the Postman and Tubman.

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CASEY v. TOMLIN and Another.

THIS was an action of assumpsit, to recover the sum of 44*l.* 2*s.* 6*d.*, for wages alleged to be due to the plaintiff as gunner and mariner on board a ship of the defendants. The action was commenced on the 1st of January, 1840. On the 6th of January, the defendants took out a summons, calling on the plaintiff to shew cause why, upon payment of the sum of 31*l.* 16*s.* 6*d.* and costs, all further proceedings in the action should not be stayed. On the hearing of this summons, the plaintiff's attorney refused to accept the amount offered, and no order was made. The declaration having been delivered, on the 24th of January the defendants pleaded non assumpsit, except as to the sum of 31*l.* 16*s.* 4*d.*, and payment into Court of that sum. On the same day, after the money had been paid into Court, the defendants were served with an order of that date, for admitting the plaintiff to sue in formâ pauperis. The defendants thereupon immediately took out a peremptory summons, calling upon the plaintiff to shew cause why the sum of 31*l.* 16*s.* 4*d.* paid into Court, should not remain in Court to abide the event of the action, unless it should be taken out by the plaintiff in full satisfaction; and *Rolfe*, B., before whom the summons was attended by both parties, made an order accordingly. On the trial of the cause, a verdict was found for the defendants, leave being reserved to the plaintiff to move to enter a verdict for 12*l.* 6*s.* 2*d.*; and a rule nisi was obtained for that purpose, which was afterwards discharged.

After a plea of payment of money into Court, in an action of assumpsit, the plaintiff obtained an order to sue in formâ pauperis. A judge thereupon made an order that the money should remain in Court to abide the event of the cause, unless the plaintiff would take it out in full satisfaction. The defendants having obtained the verdict, the Court ordered that the money should be paid out to them in satisfaction of their costs antecedent to the order to sue in formâ pauperis.

Semble, a plaintiff may be admitted to sue in formâ pauperis after the commencement of the suit.

The action of assumpsit is within the operation of the stat. 23 Hen. 8, c. 15, s. 2.

Butt thereupon obtained a rule, calling upon the plaintiff

CASES IN THE EXCHEQUER,

— *leas*, to shew cause why he should not be dispanpered, and why
 the Master should not tax the defendants their costs; and
 if taxed at so much or more than the sum paid into Court,
 IN. why the same should not be paid out to the defendants, or
 if taxed at a less sum, why the amount taxed should not be
 deducted from the amount paid into Court, and paid out
 to the defendants.

Erle and *Humfrey* shewed cause.—The real question in this case is, whether a plaintiff can be admitted to sue in formâ pauperis after the commencement of the suit. In *Foss v. Racine* (a), this Court intimated a doubt whether an admission after the commencement of the suit was regular; and in *Lovewell v. Curtis* (b), decided that it was not. That decision, however, appears to have proceeded upon a misconstruction of the statutes relating to this subject. The stat. 23 Hen. 8, c. 15, s. 2, enacts, "That all and every such poor person or persons, being plaintiff or plaintiffs in any of the said actions, bills, or plaints, (mentioned in s. 1), which at the commencement of their suits or actions be admitted by the discretion of the Judge or Judges where such suits or actions shall be pursued and taken, to have their process and counsel of charity, without any money or fee-paying for the same, shall not be compelled to pay any costs by virtue and force of this statute (i. e. on nonsuit or verdict for the defendant,—s. 1), but shall suffer other punishment, as by the discretion of the Justice or Judge afore whom such suits shall depend, shall seem reasonable." The whole effect of this enactment is to relieve the parties therein mentioned from costs, on a nonsuit or verdict for the defendant. It gives only an exemption to a particular class of persons, viz. those admitted paupers at the commencement of the suit, from the costs which were then first imposed on plaintiffs, in the case of a

(a) 4 M. & W. 610.

(b) 5 M. & W. 158.

nonsuit or a verdict for the defendant. The stat. 11 Hen. 7, c. 12, enacts, that "every poor person or persons which have or hereafter shall have cause of action or actions against any person or persons within this realm, shall have, by the discretion of the Chancellor of this realm for the time being, writ or writs original, and writs of subpoena, according to the nature of their causes, therefore nothing paying, &c., &c.; and after the said writ or writs be returned, if it be afore the King in his Bench, the Justices there shall assign to the same poor person or persons counsel learned, by their directions, which shall give their counsel, nothing taking for the same, and likewise the Justices shall appoint attorney and attornies for the same poor person or persons, &c., &c.: and the same law and order shall be observed and kept of all such suits to be made afore the King's Justices of his Common Pleas, and Barons of his Exchequer, and all other Justices in the Courts of Record, where any such suit shall be." There is nothing in that clause applying particularly to the commencement of the suit; it is an enactment applicable just as much to any subsequent stage of the cause. [Lord Abinger, C. B.—That statute appears to refer to the commencement of the suit, when it speaks of the pauper having an original writ out of Chancery.] The Court would pause before they construed it according to its strict letter, which would require that an original writ should in every case have been sued out in Chancery. Such a construction could have no application to modern times. [Lord Abinger, C. B.—The 23 Hen. 8, c. 15, extended the right to sue in forma pauperis to proceedings by bill; but the original power of the Court to admit a plaintiff so to sue depends on the 11 Hen. 7, which by implication gives that power only at the commencement of the suit.] That statute has in practice been construed as authorizing the admission of the pauper at any period of the suit. But the stat. 23 Hen. 8 does not create or affect the power of making pauper plaintiffs;

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all that it says is, that all plaintiffs shall pay costs on a non-suit or verdict for the defendant, except a particular class of pauper plaintiffs, viz., those admitted at the commencement of the suit. In *Oats v. Holiday*, cited by *Wilmot*, C. J., in *Blood v. Lee* (a) from his manuscript notes, it is said to have been "at first doubted whether a plaintiff could be admitted in formâ pauperis after the commencement of the suit; but at length it was resolved that he might be so admitted at any time of the suit; and the Court resolved, that a person so admitted, pendente lite, shall not pay costs from the beginning of the action." [*Parke*, B.—In *Blood v. Lee* the question was adjourned; so that the point appears to have been considered doubtful.] In *Jones v. Peers* (b), the application was for costs incurred previously to the plaintiff's admission to sue in formâ pauperis.

But further, if the stat. 23 Hen. 8 be held to apply, so as to render the admission of a pauper after the commencement of the action irregular, it may be questioned whether that statute extends to actions of assumpsit. The actions, &c., mentioned in the first section are, any action, bill, or plaint of trespass on the 5 Ric. 2, or any action, bill, or plaint of debt or covenant upon any specialty, or of detainue or account, "or any action, bill, or plaint upon the case, or upon any statute, *for any offence or wrong personal*, immediately supposed to be due to the plaintiff," &c. These words seem properly to apply to actions ex delicto only. Then the stat. 4 Jac. 1, c. 3, reciting that actions of trespass and ejectment, *and many other actions, real and personal*, are within the mischiefs intended to be provided against, "and yet were omitted out of the provisions of the said law," extends the operation of the 23 Hen. 8, c. 15, to actions of every kind. [*Parke*, B.—I never before heard it doubted that the statute of Hen. 8 applied to actions of assumpsit.] Lastly, these are not costs

(a) 3 Wils. 24.

(b) M'Clel. & Y. 232.

within the meaning of that statute; they are costs specially payable by virtue of the rule of H. T. 4 Will. 4, s. 19. That rule gives a mode of proceeding, by payment into Court after declaration, which did not exist before, and provides for the costs payable on that proceeding. [*Parke, B.*—The rule gives the mode of proceeding; but the defendant gets his costs under the statute of Hen. 8. The plaintiff has gone down to trial on the issue whether more money was due to him than the sum paid into Court, and on that issue the defendant has had a verdict.]

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Butt, contra.—The stat. 23 Hen. 8 clearly applies to actions of assumpsit: the term “actions on the case” may include both actions of assumpsit and actions ex delicto. This is an action on the case on assumpsit. Then it is said the stat. of 11 Hen. 7 enables the Courts to admit a pauper during the pendency of the action. That statute in terms applies only to those cases in which an original writ was issued out of Chancery, and impliedly refers to the period of the commencement of the suit. But this plaintiff has been admitted, not under that act, but under the 23 Hen. 8, which expressly refers only to plaintiffs admitted paupers at the commencement of the suit. If the argument on the other side have any weight, it would go to shew that the party could not be admitted to sue in formâ pauperis at all; since, if the case be taken out of the first section of the statute, it is equally out of the second. [*Parke, B.*—The case of *Langley v. Blackerley*, which is referred to in *Blood v. Lee*, and which is reported in *Andrews*, p. 306, would seem to be an authority that a plaintiff may be admitted a pauper after the commencement of the suit.] There does not appear to be any direct authority that such a practice is correct. In *Jones v. Peers*, the Court only refused to dispauper the plaintiff after a lapse of two years. The authority of the Court is derived from the statutes alone, which clearly do not admit of the construction contended for by the plaintiff. But even if

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Erle referred to *Morgan v. Eastwick* (a).

LORD ABINGER, C. B.—The real question here is, whether, while my Brother *Rolfe's* order is standing and acquiesced in, we are to refuse to put it in force. If it be irregular, that is not the question here; the plaintiff has never made any objection to it; and I am strongly inclined to think that the admission of a plaintiff as a pauper after the commencement of the suit is irregular: the statutes appear to be directly against it; but nevertheless, if there were any decisions the other way, or any inveterate practice to that effect, the Court would be anxious not to overturn it. In the case of *Blood v. Lee*, the Court, although an authority was produced to them in favour of the admission pendente lite, thought it did not conclude the matter, but adjourned the consideration of the question, and apparently did not think fit to make the rule absolute. Then there are the recent cases in which this Court has decided the contrary; and on this full investigation, I remain of the same opinion. The statute of Hen. 7 applied only to original writs, and the 28 Hen. 8 by implication gave a power to admit a pauper at the commencement of a suit by bill, and clearly includes an action of assumpsit.

PARKE, B.—If there be no case by which we are bound, the question as to the construction of the statutes seems to admit of no doubt. Though the statute of Hen. 7 applied principally to originals out of Chancery; yet the latter words of the clause appear to have given the Judges of the other Courts the power of adopting the same proceedings in ac-

(a) 7 Dowl. P. C. 543.

tions commenced by latitat, bill, or quo minus. The practice has always been so to construe it, and we have no wish to throw any doubt on the propriety of that practice. Then the stat. of Hen. 8 makes all plaintiffs liable to costs—in assumpsit as well as in other actions—on a nonsuit or verdict for the defendant, unless they fall within the exempted class, *i. e.* of paupers admitted at the commencement of the suit. No doubt, at that time it was never thought that the party could be admitted at any other period, although it appears subsequently to have been the practice to do so, the pauper being held liable to pay the antecedent costs. There is no case which has put a construction on the statute except that referred to in *Wilson*, which, for the reasons given by my Lord Chief Baron, is not satisfactory. In *Morgan v. Eastwick*, the point was not raised. I think, therefore, we ought to abide by the late decisions in this Court.

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The other Barons concurred, and it was ordered that the rule should be absolute. On the following day, however,

LORD ABINGER, C. B., said—We have looked into the case which was referred to yesterday, in *Andrews's Reports* (a), and it appears that there the Court said, that by implication they had, under the 11 Hen. 7, c. 12, power to admit a party to sue in formâ pauperis at any stage of the cause. The present rule, therefore, will not be absolute in all its terms, but as to the latter part of it only, whereby the defendants will be enabled to obtain their costs out of the money paid into Court. It must be understood that we give no opinion on the question of dispaupering the party, but confine our judgment to the latter part of the rule. The result will be, that the money will be paid out of Court

(a) *Langley v. Blackerley*, Andr. 306.

Exch. of Pleas, to the defendants, in satisfaction of their costs up to
 1840. the time of the plaintiff's admission to sue in formâ pau-
 CASEY peris.
 v.
 TOMLIN. Rule accordingly.

BROWN v. M'MILLAN.

A capias may be issued under the stat. 1 & 2 Vict. c. 110, s. 3, into a county palatine, to be executed in that county, although it be indorsed for a less sum than £50.

IN this action, after the writ of summons had been sued out, a writ of capias, indorsed for bail in the sum of £22, was issued under a Judge's order, made in pursuance of the stat. 1 & 2 Vict. c. 110, s. 3, and in the form prescribed by that act. The writ described the defendant as "of Liverpool, in the county of Lancaster," and was directed "to the Chancellor of the county palatine of Lancaster, or his deputy there." Upon receipt of the writ, the usual warrant was made out from the Chancellor to the sheriff of Lancashire, who, however, refused to execute the writ, on the ground that, by the stat. 7 & 8 Geo. 4, c. 71, s. 7, a defendant was not arrestable within the county palatine for a sum under £50. Gurney, B., having thereupon made an order directing the sheriff to return the writ, *Wightman* obtained a rule to shew cause why that order should not be set aside.

Martin shewed cause.—The question in this case is, whether the 7th section of the 7 & 8 Geo. 4, c. 71, is not virtually repealed by the 1 & 2 Vict. c. 110, s. 3. The preamble of the 7 & 8 Geo. 4, c. 71, s. 7, states, 'that the holding to bail of persons *inhabiting within* the counties palatine, by process out of the Courts of Record at Westminster, in debts of a small amount, is oppressive and vexatious;' and it is then enacted, "That no sheriff or other officer within the counties palatine shall, upon any *mesne process* issuing out of any of the superior Courts, arrest or hold any person to special bail, unless

such process shall be duly marked and indorsed for bail in a sum not less than £50." It is clear that the object of this act was to prevent defendants from being arrested for small sums, within the counties palatine, *by mesne process* out of the superior Courts, when the plaintiff might proceed by process out of the Court of the county palatine. But since the stat. 1 & 2 Vict. c. 110, all mesne process is at an end; and the writ of *capias* given by the 3rd section of the act is a mere ancillary proceeding for the plaintiff's security, in the nature of writ *ne exeat regno*, which may issue at any stage of the suit, and may go into a different county from that into which the writ of summons was issued. The writ mentioned in the 7 & 8 Geo. 4, c. 71, s. 7, on the contrary, was the commencement of the action; and when the object was to proceed by bailable process, the plaintiff must have known where the defendant was resident. That statute, therefore, must now be considered as virtually repealed. [*Parke, B.*—The question is, what is the meaning of the words in the 1 & 2 Vict. c. 110, s. 3, "a plaintiff in any action in any of the superior Courts, *in which the defendant is now liable to arrest*"?] The true construction is, that it comprehends any action in the superior Courts, in which the defendant is indebted to an amount sufficient to render him liable by law to arrest. The words refer to that state of things in which the defendant is *generally*, by law, liable to arrest. The subsequent words, "one or more writ or writs of *capias* into one or more different counties," contain no exclusion of the counties palatine; and the proviso at the end of the section, makes express provision for the direction of the writs when issued into the counties palatine. If the construction contended for on the other side be correct, a defendant living in London, and against whom an action has been commenced there for a debt above £20, but under £50, might, by going into a county palatine, set at defiance a writ of *capias* obtained by the

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plaintiff, and escape out of the kingdom from any seaport in that county. Again, if that construction be correct, the 21st section, which extends all the remedies and provisions of the act to the Courts of the counties palatine, within the limits of their jurisdiction, cannot have the general operation which the legislature intended to give it, as to all the subjects of the realm; but whenever the debt is between £20 and £50, the benefit of the provision will be lost.

But secondly, even supposing the 7 & 8 Geo. 4, c. 71, s. 7, to be still in force, it applies only, as appears from the preamble, to persons *inhabiting within* the counties palatine; and here it does not distinctly appear on the affidavits, whether the defendant is an inhabitant in Lancashire, or merely a temporary sojourner there. [*Parke, B.*—That is not at all material. The preamble no doubt recites the mischief of holding to bail persons *inhabiting within* the counties palatine, for small sums; but the enacting words are, “That no sheriff, &c., within the counties palatine, shall arrest or hold *any person* to special bail,” &c. It would be very inconvenient if the sheriff of a county palatine, before he could execute the *capias*, were to be compelled to determine at his peril whether the party were an inhabitant within the county or not, which might often be a question of great nicety.] At all events, the motion should have been to set aside the Judge’s order on which the *capias* issued. [*Parke, B.*—No; if their construction be the right one, that order was but waste paper, and the writ was a mere nullity, to which the sheriff was not bound to make any return.]

Wightman, contra.—The stat. 7 & 8 Geo. 4, c. 71, s. 7, is still in force. The words of the 1 & 2 Vict. c. 110, s. 3, are:—“If a plaintiff in any action in any of the superior Courts, in which the defendant is *now* liable to arrest,” &c., &c. The question, therefore, must be considered as at the time of the passing of the act. Now, before it came into

operation, the liability to arrest *within a county palatine* was regulated by the 7 & 8 Geo. 4, c. 71, s. 7; the effect of which was, that when the bailable writ was marked for bail in a sum amounting to £50, process might issue from the superior Courts at Westminster; but if for less than that sum, and not less than £20, the process must issue from the Court of the county palatine. The words of the present statute are not “in case of any *debt* for which the defendant is liable to arrest;” but “in any *action*” in which he is so liable. Now, in this action, the defendant was only liable to arrest elsewhere than within a county palatine; he was not liable to arrest in Lancashire. There are no words in the act applying in terms to the limitations contained in the 7 & 8 Geo. 4, c. 71, s. 7, as to arrests in counties palatine; and the proviso at the end of sect. 8 applies only to cases in which the process of the superior Courts could before have been executed in a county palatine, viz. where the sum amounted to £50 or upwards. Then the 21st section expressly gives to the Judges of the Courts of the counties palatine the same authorities as are given by the act to Judges of the superior Courts, within the limits of their jurisdiction. Taking this defendant and his situation as a resident in Lancashire together, he was not a defendant liable to arrest in this action. Relation must be had as well to *the defendant* as to the *action*; because the words are—“any action, &c., in which the *defendant* is now liable to arrest.”

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On a subsequent day, the judgment of the Court was delivered by

PABKE, B.—The question reserved for the consideration of the Court in this case was, whether a Judge of the superior Courts at Westminster is empowered by the stat.

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1 & 2 Vict. c. 110, s. 3, to issue a *capias* into a county palatine for a less sum than £50, to be executed in that county; and we think that he has such a power, and that the sheriff is bound to execute the *capias* so issued. By the stat. 7 & 8 Geo. 4, c. 71, s. 7, a restriction was imposed upon the operation of writs of *mesne process*, issuing from the superior courts at Westminster into counties palatine. That statute enacts, "That no sheriff or other officer, within the counties palatine of Lancaster and Durham, shall, upon any *mesne process* issuing out of any of his Majesty's Courts of Record at Westminster, arrest or hold any person to special bail, unless such process shall be duly marked and indorsed for bail, in a sum not less than £50." The 1 & 2 Vict. c. 110, s. 1, abolishes arrest on *mesne process* issuing from the superior courts, except in certain cases specially provided for. The effect of the first section, if it stood alone, would be to render the 7 & 8 Geo. 4 a dead letter, and to do away altogether with arrest on *mesne process*, in the counties palatine as well as elsewhere. But the third section gives a right of arrest in certain cases, and provides for the purpose a new writ of *mesne process*—not of *mesne process* in the sense in which the word is used in the former act, but *mesne* in this sense, that it is a proceeding to be taken between the commencement of the suit and final judgment; which is issued for the collateral purpose of obtaining security for the amount of the plaintiff's claim, if recovered in the suit, and not for the advancement of the suit itself: and the question therefore is, whether any restriction is now imposed by law on the execution of such a writ within the counties palatine. There is certainly no express restriction; the only question is, whether it is to be implied from the proviso at the end of the third section. That section enacts, that "if a plaintiff in any action at law in any of her Majesty's superior courts of law at Westminster, in which the defendant is now (that is to say, at the time of the

passing of the act) liable to arrest, whether upon the order of a Judge or without such order, shall by the affidavit of himself, or of some other person, shew to the satisfaction of a Judge of one of the said superior courts, that such plaintiff has a cause of action against the defendant or defendants, to the amount of £20 or upwards, or has sustained damages to that amount, and that there is probable cause for believing that the defendant, or any one or more of the defendants, is or are about to quit England, unless he or they shall be forthwith apprehended; it shall be lawful for such Judge, by a special order, to direct that such defendant or defendants, so about to quit England, shall be held to bail for such sum as such Judge shall think fit, not exceeding the amount of the debt or damages; and thereupon it shall be lawful for such plaintiff, within the time which shall be expressed in such order, but not afterwards, to sue out one or more writ or writs of *capias* into one or more different counties, as the case may require, against any such defendant so directed to be held to bail, which writ of *capias* shall be in the form contained in the schedule to this act annexed, and shall bear date on the day on which the same shall be issued: Provided always, that the said writ of *capias*, and all writs of execution to be issued out of the superior Courts of Westminster, into the counties palatine of Lancaster and Durham, shall be directed to the chancellor of the county palatine of Durham, or his deputy there." Now the whole question turns on the construction to be put upon this part of the statute. This section does not say, that in those cases, or under those circumstances, in which the defendant was not previously liable to arrest, he shall be so under the new process; but that *in every action*, that is to say, in every *species* of action (of which this is one) in which the defendant was at the time of the passing of this act liable to arrest, the Judge shall have power to order process to issue under the act. This construction is in accordance

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with the natural and ordinary meaning of the words used by the legislature; and acts of Parliament ought always to be construed as using the words in their common and ordinary sense, unless it appears from the other parts of the enactment, that some absurdity or incongruity would follow from so construing them. Now that certainly is not the case here; for the express provision that the new writ of *capias* may run into the counties palatine, to be directed to the chancellor there, clearly shews a power in the Judge to issue such writ for £20 and upwards, as described in the former part of the section, and without distinction of the counties palatine in any respect. The necessary effect of the clause is, to authorize the Judge to issue this writ; and when once issued, no limit is placed to its operation. In order to support the opposite construction contended for by the sheriff in this case, qualifying words must be introduced into this part of the act; such as, that the writ of *capias* is not to issue into a county palatine at all, or that it is to have no effect there, unless when allowed by the Judges of the Court of the county palatine. The introduction of words in this manner may be proper, when an enactment is not sensible or rational without them; but that is by no means the case in the present instance; on the contrary, by the construction which we put on this section, the plaintiff has the full benefit which the legislature intended to give him, viz. the power of arresting the defendant by means of several concurrent writs issued into different counties; a benefit of which he would otherwise be to a certain extent deprived, if the defendant were resident in a county palatine. If, on the other hand, the plaintiff chooses to bring his action in a county palatine, he can, by the provisions of the 21st section, still resort to the same writ, by application to the Judge of the Court of the county palatine.

The point in question in this case does not appear to have been hitherto formally decided; we have been in-

formed, however, by Lord Chief Justice *Tindal*, that he on one occasion discharged a person arrested in a county palatine for a sum under £50, but that he afterwards entertained doubts as to the propriety of that course.

We are of opinion, therefore, that the sheriff was bound to execute the writ in this case, and this rule must consequently be discharged, but, under the circumstances, without costs.

Rule discharged without costs.

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HARWOOD v. LAW, Public Officer, &c.

THIS was an action against the defendant, as the public registered officer of the Imperial Bank of England; and judgment having been signed for the plaintiff for 14*l.* 17*s.*, the amount of the damages and costs, execution was issued thereon against the defendant, and he was detained in custody for that sum at the suit of the plaintiff. *Cresswell* had obtained a rule, calling upon the plaintiff to shew cause why the execution should not be set aside, and the defendant discharged out of custody, on the ground that the execution could not issue without a previous *scire facias*. The defendant did not, in his affidavit in support of the rule, deny that he was a member of the Company.

Where a plaintiff obtains judgment against the public officer of a joint-stock banking co-partnership, pursuant to stat. 7 Geo. 4, c. 46, s. 9, he may issue execution against the defendant without first suing out a *scire facias*.

W. H. Watson shewed cause.—No *scire facias* was necessary in this case, the defendant being not only the public registered officer, and as such a party to the record, but also, as it must be assumed, a member of the company. The question depends upon the construction to be put on several of the clauses of the Banking Copartnership Act, 7 Geo. 4, c. 46. The 4th section impliedly requires that the two public registered officers, who are by sect. 9 to sue and be sued on behalf of the Company, shall be members of the

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copartnership. The 9th section enacts, that all actions and suits, &c. to be commenced on behalf of the copartnership shall and lawfully may be commenced and prosecuted in the name of one of the public officers for the time being, as nominal plaintiff; and all actions or suits, &c. to be commenced against the copartnership, shall and lawfully may be commenced and prosecuted against one of the public officers, "as the *nominal defendant* for and on behalf of such copartnership." Then sect. 12 provides, that all judgments recovered against any public officer of the copartnership "shall have the like effect and operation upon and against the property of the copartnership, and upon and against the property of any member thereof, as if such judgments had been recovered or obtained against such copartnership;" and sect. 13, that execution upon any judgment obtained against the public officer may be issued against any member or members for the time being of the copartnership. There is nothing in these clauses to exempt the defendant from liability in his character of a member of the Company, or to prevent the judgment from operating in the ordinary way against the registered officer, as the party to the record, if, like the present defendant, he is also a member of the copartnership. The defendant might have pleaded to the action that he had ceased to be a member of the Company, if the fact were so. In a recent case of *Rawlinson v. Nuttall* (a), it appeared that the action was commenced against the defendant, as the public officer of a banking copartnership, on the 3rd of August, 1839. On the 22nd of August he became a bankrupt; in October following he ceased to be the public officer, but took no steps to have his name removed from the record; on the 10th of December judgment was entered up against him, an execution issued thereon, under which he was arrested and having paid the debt and costs, under protest, in or

(a) Not reported.

to procure his liberation, he applied to this Court to set aside the judgment and execution, and to have the money repaid to him; but the application was refused, on the ground that, by taking no step to remove his name from the record, he had admitted himself to be a member of the Company, and as such liable to the execution. That case is expressly in point.—He also referred to *Harrison v. Timmins* (a), and *Wood v. Marston* (b).

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Cresswell, contra.—The plaintiff was not entitled to issue execution against this defendant, without first suing out a scire facias. Having elected to avail himself of the mode of proceeding given by the statute, instead of proceeding according to the course of the common law, as he might have done (for the words “shall and lawfully may,” in the 9th section, cannot be considered as imperative on the plaintiff), he must proceed throughout according to the statute; he cannot engraft a common law execution upon a statutory judgment. A judgment against the public officer can have effect only against those who are members of the copartnership at the time of judgment signed. Then, by sect. 13, execution may issue thereon against members for the time being; or, if ineffectual in such case, then against those who were members at the time when the contract was entered into, or before it was executed, or at the time of the judgment obtained, by leave of the Court. Now, although the record would undoubtedly be strong evidence to shew that the defendant was a member of the copartnership at the time of judgment obtained, it would not necessarily prove that he continued such up to the time when execution issued. At all events, that is not a question to be tried upon affidavits, but ought to be determined by a jury upon a scire facias. It has already been decided that execution cannot issue against a member of the copartnership, who is not a party

(a) 4 M. & W. 510.

(b) 3 Dowl. P. C.

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to the record, without a *scire facias* (a); and the practice ought to be the same with regard to the public officer, who is sued merely as a nominal defendant by virtue of the statute, and has no interest in the suit beyond that of the other members of the copartnership.

Cur. adv. vult.

On the following day, the Court delivered judgment.

LORD ABINGER, C. B.—This was an application for the discharge of the defendant out of custody, on the ground that, upon the proper construction of the act of Parliament for regulating joint-stock banking companies, the defendant, who is sued as the registered officer of the Imperial Bank of England, is not liable to be taken in execution, unless he was a member of the copartnership at the time when the execution issued. Mr. *Cresswell* contended that he must be shewn to be such by *scire facias*, in conformity with the decision of this Court, that that mode of proceeding is necessary in cases where the judgment is obtained against the registered officer as the nominal defendant, and it is sought to have execution against some other member of the Company, not a party to the record. It is to be observed, that the defendant in this case neither states that he is not a member of the company, nor alleges any other facts to shew to the Court that he is not the proper object of execution upon this judgment. As he has not done so, the necessity for a *scire facias* does not seem to arise. When the Courts direct a *scire facias* to issue, it is only with the view of rendering their own records consistent. The first case in which a question of this kind arose was that of *Bartlett v. Pentland* (b), where the plaintiff, having obtained judgment against the secretary of the St. Patrick's Assurance Company, took out execution against another

(a) *Cross v. Law*, 6 M. & W. 217.

(b) 1 B. & Ad. 704.

member of the company, (an alderman of Dublin, who happened to be in London on some public business,) without first obtaining the leave of the Court to enter a suggestion on the record. The Court on that occasion said, that some suggestion ought to be put upon the record, in order to make a party liable to the execution, who was not a party to the record at the time of the judgment. Since then, the proper mode of doing this has been taken more fully into consideration, and the Courts have decided, I think rightly, that it must be by writ of scire facias. A suggestion on the record would indeed have the same effect, a scire facias does nothing more, and they may both be traversed; but the latter is an original and well understood process for the purpose. A scire facias, however, is resorted to only for the specific purpose of making the judgment and execution consistent with each other; since otherwise there would be judgment against A. and an execution upon against B., which would render the record absurd and inconsistent: but the scire facias makes the record technically correct, and the party has the opportunity of contesting whether he is really liable to the execution or not. But it appears to the majority of the Court, that if we were to accede to the argument urged on the part of the defendant, and hold a scire facias necessary in this case, the greatest inconvenience would follow; for as the parties liable to the execution in the first instance are those only who are members of the copartnership at the time of the execution, and the scire facias would only establish that the defendant was such at the time of the judgment, no execution could issue against him until a fresh scire facias was issued, to shew that he was a member at the time execution issued: so that scire facias after scire facias would be necessary. It never could have been the intention of the legislature to introduce such an inconvenience as this, which would certainly be the consequence if the act of Parliament were to be interpreted as is contended for by Mr. *Cresswell*.

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The defendant, therefore, ought to have shewn by affidavit that he had bonâ fide and without fraud ceased to be a member of the copartnership, in which case he would be no longer liable to be taken in execution. At present he appears to be a party to the record and a member of the company, and he has shewn no reason why the execution should not issue against him as such. I think, therefore, that this rule ought to be discharged, but, under the circumstances, without costs.

PARKE, B.—The mode of obtaining execution upon a judgment obtained against a joint-stock banking copartnership, is distinctly pointed out by the stat. 7 Geo. 4, c. 46, s. 13. The execution is to issue, in the first instance, against those who are members of the copartnership for the time being, i. e. at the moment of suing out the execution: and the Courts have decided, that the party against whom it is intended thus to proceed, is entitled to have the question, whether he were such member or not, determined by a jury, and that the course of proceeding for that purpose ought to be by writ of scire facias, which will have the effect of shewing, on the face of the record, the grounds on which the execution issued against a person who was no party to the judgment. But a great difficulty arises when we attempt to put a construction on this part of the enactment; for the scire facias only shews that the party against whom it issues was a member of the copartnership at the time of the *judgment*, and not at the time of issuing execution. In order to reconcile this difficulty, it seems to me that the scire facias may be considered as a part of the execution contemplated by the legislature in framing this section; and then, the party being shewn to be a member at the time of the scire facias, he is liable. If this view be correct, I entertain considerable doubt whether the defendant in the present case is concluded by the judgment, or whether he has not a right to insist that the question, whe-

ther he was a partner at the time when execution issued,— i. e. when the scire facias issued,— should be submitted to a jury; and consequently, whether he is not entitled now to be discharged out of custody: but as the rest of the Court agree in the view taken by the Lord Chief Baron, my doubts will of course be unavailing. The course to be afterwards pursued with respect to the several other classes of persons made liable to the execution, is very clearly pointed out by the act: first, it is to go against those who were members of the Company at the time when the contract was entered into; then, if the plaintiff fails by those means to obtain satisfaction, his next step must be by application to the Court, for leave to proceed against those who were members before the contract was executed; and lastly, he is entitled to proceed against those who were members at the time of the judgment obtained: and although no precedence is expressly marked out by the statute, as between these and the former classes,—the words of the clause comprising them all in the same sentence, that “it shall be lawful for the party so having obtained judgment, to issue execution against any person or persons who was a member when the contract was entered into, or became a member before it was executed, or was a member at the time of the judgment obtained;”—still, by the construction put upon this section, execution is to issue, first against one of these classes, and then against the other, and the defendant is only to be concluded by the record that he was a member at the time of the judgment obtained. The present inclination of my opinion, therefore, certainly is, that the execution issued against this defendant, without giving him an opportunity of trying the question whether he was a partner in the Company, not at the time of the judgment, but at the time of the execution, is irregular. That is a question which, in my opinion, is not to be determined on affidavits, but to be tried in the regular way by a jury.

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CASES IN THE EXCHEQUER,

GURNEY, B.—The defendant is sued as the public officer of a joint-stock bank, and is taken in execution as being a partner. He applies to be discharged from custody, but does not allege that he was not a partner, either at the time of the judgment, or of the execution, or when the debt was incurred which is the subject of the action. Under these circumstances, I think a *scire facias* is not necessary.

ROLFE, B.—I concur with the Lord Chief Baron in thinking that no *scire facias* is necessary in this case. In the first place, it appears to me to be very doubtful whether the plaintiff is bound in the first instance to proceed against a party who was a member of the co-partnership at the time of the execution; for the act only says, "That execution shall and lawfully may be issued against any member for the time being of such corporation or co-partnership," and in case of its being ineffectual, then against other parties. Now, independently of the provisions of the statute, no one could be liable on a contract made by the Company, except those who were members at the time the contract was entered into; but in order to enable plaintiffs to proceed against parties who may have subsequently purchased shares, the legislature says, that they may have execution against any one who is a member of the Company for the time being. If it be taken to refer to those persons who were not partners at the time of the contract, but became so afterwards, the construction is perfectly natural, and I find nothing in the act inconsistent with it. The section then goes on to say, that if the execution against those members should prove ineffectual, the plaintiff may proceed against any one who was a member at the time of the contract, or before its execution, or at the time of judgment: i. e. although he may have chosen to take execution against those who were members at the time being, he may still proceed against those who

members at the time of the contract entered into or executed, or of judgment recovered. There is certainly considerable difficulty in putting a construction upon the act; but it is not possible that the consequence, which has been mentioned by my Lord *Abinger* as necessarily resulting from the construction contended for by the defendant, could have been contemplated by the legislature; there would, as he has remarked, necessarily be a series of writs of scire facias one after another. An attempt is made to get over this difficulty, by supposing the scire facias to be understood as the beginning of the execution; but if it be necessary to put such a construction upon the statute, why not as well say that the judgment is the beginning of the execution? For these reasons, I concur in opinion that a scire facias was not necessary, and that this rule must be discharged.

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LORD ABINGER, C. B., added—I cannot agree in the opinion that the scire facias can be considered as the beginning of the execution.

Rule discharged, without costs.

POYNER v. HATTON.

IN this case, all matters in difference in the cause having been referred under a judge's order, the arbitrator awarded that the action should cease, and be no further prosecuted; and that the plaintiff, on a day named, should pay to the defendant the sum of 2*l.* 18*s.* 6*d.* The costs were afterwards taxed in favour of the defendant at the sum of £37.

Where an arbitrator, to whom a cause was referred, awarded that the action should cease, and that a sum of money should be paid by the plaintiff to the defendant; and

the defendant's costs having been taxed, both sums were demanded of the plaintiff:—*Held*, that, inasmuch as the arbitrator had exceeded his authority in directing payment of the sum of money to the defendant, an affidavit which stated that the defendant demanded of the plaintiff the said sum of money, and also the amount of the costs, but that the plaintiff did not pay the same, or any part thereof, was not sufficient to ground an attachment.

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Hance had obtained a rule for an attachment against the plaintiff for non-performance of the award. The affidavit on which the rule was granted stated, that the defendant demanded of the plaintiff the said sum of 2*l.* 18*s.* 6*d.*, and also the sum of £37, the amount of the taxed costs, but that the plaintiff did not pay the same, or any part thereof.

J. Henderson shewed cause, and contended, that as the reference was merely of the matter in difference in the cause, the arbitrator had no power to award payment of a sum of money by the plaintiff to the defendant; and therefore, that the defendant, by demanding payment of that sum, as well as of the amount of the costs, had asked for too much, and consequently was not entitled to an attachment.

Hance, *contra*, admitted that the arbitrator had exceeded his authority, and that the defendant could not enforce payment of the 2*l.* 18*s.* 6*d.*; but urged, that the award was good for the residue, and that as the defendant had demanded the two sums separately, and not in a gross sum, and it was sworn that the plaintiff had not paid the money demanded, *or any part thereof*, it sufficiently appeared that he had refused to pay the amount due for costs, in respect of which, therefore, the plaintiff was entitled to an attachment.

LORD ABINGER, C. B.—The affidavit only states that the plaintiff did not pay the said sums, or any part thereof; if it had gone on to say “or either of them,” it might have been sufficient. It is consistent with it that the plaintiff tendered the amount of the costs. You ought to make out a clear case of refusal.

PARKE, B., GURNEY, B., and ROLFE, B., concurred.

Rule discharged, without costs.

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ATKINSON v. HOWELL.

O'MALLEY applied for a rule calling upon the defendant to shew cause why the plaintiff should not be at liberty to enter an appearance for the defendant according to the statute, without indorsing upon the writ of summons the day of the week and month of service, as required by the rule of M. T. 3 W. 4. It appeared from his affidavit, that the original writ had been sent by post to the defendant, at his request, on the 14th of October. On the 9th of November, he acknowledged the receipt of it, and said that he would direct a settlement of the debt to be made: but he had done nothing since, and kept possession of the writ.—In *Brook v. Edridge (a)*, where the defendant, on being served with process, snatched the original writ out of the hands of the person serving it, the Court granted a similar rule, and made the defendant pay the costs of it. Here, also, as it was in consequence of the improper conduct of the defendant that the indorsement could not be made in conformity with the rule of Court, the Court would interfere to assist the plaintiff.

Where the original writ of summons was sent by the plaintiff to the defendant at his request, but he kept it, and did not appear, the Court refused to allow the plaintiff to enter an appearance for the defendant *sec. stat.*, without indorsing on the writ the date of the service, pursuant to the rule of M. T. 3 Will. 4.

PER CURIAM.—Here the plaintiff has brought himself into the difficulty by not following the usual course. No doubt, as a man of honour, the defendant ought to appear, but if he does not, we cannot assist you.

Rule refused.

(a) 2 Dowl. P. C. 647.

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DIXON v. WALKER (a).

Where a plaintiff claims more than £20, but obtains a verdict for a sum under £20, by reason of a tender of the remainder of the amount claimed before action brought, his costs must be taxed on the reduced scale applicable to the recovery of a sum under £20.

THIS was an action of debt, in which the plaintiff by his particulars claimed a sum exceeding £20. The defendant pleaded as to part of the demand, a tender before action brought, and as to the residue *nunquam indebitatus*. The plaintiff took out of Court the money paid in under the plea of tender, and entered a *nolle prosequi* as to that amount; and at the trial, he had a verdict for the balance claimed by him, viz. £13. The Master, on taxation, allowed the plaintiff his costs according to the ordinary scale.—*Petersdorff* having obtained a rule nisi for a review of the taxation, on the ground that the costs ought to have been taxed on the reduced scale applicable, according to the “Directions to Taxing Officers,” H. T. 4 Will. 4, to a recovery of a sum under £20,

Wightman shewed cause, and relied on *Masters v. Ticker (b)*, where it was held that if the amount recovered by the verdict, together with the money paid into Court, exceed £20, the plaintiff is entitled to costs on the higher scale. If the lower scale were held to be applicable to a case like this, it would always be in the defendant’s power to force the plaintiff down to that scale. For instance, if the demand were for £25, the defendant would only have to tender £6 before a writ was served, and then the plaintiff would recover his costs according to the reduced scale only, which would be highly unjust.

Petersdorff, *contra*.—The effect of a finding in favour of the defendant on a plea of tender, is to shew that the

(a) This and the two following cases were decided by *Alderson*, B., sitting alone on the last day of the term.
(b) 2 Harr. & Woll. 81.

plaintiff was not entitled, at the time of the commencement of the action, to any more than the balance beyond the sum tendered. It defeats the right of action to that extent, before action brought. It now appears on the face of the record, that the plaintiff had no cause of action to the amount of £20. The case of payment into Court after action brought is different; that is not a denial of the existence of any part of the cause of action at the time of issuing the writ. That distinguishes the present case from *Masters v. Tickler*. In *Savage v. Lipscomb (a)*, it was held, that even where the plaintiff's demand is reduced below £20 by a cross demand of the defendant, which is made the subject of a set-off, he is entitled to costs on the reduced scale only. That is a much stronger case than the present. So also, where to an action of assumpsit the defendant pleaded non-assumpsit and a set-off, and paid £2 into Court, and the cause was referred to arbitration, the party in whose favour the award was made being at liberty to enter up judgment for the sum awarded as upon a verdict, and the arbitrator awarded to the plaintiff a sum under £20, it was held that this was a sum *recovered*, within the meaning of the rule, and that the costs must be taxed according to the reduced scale: *Wallen v. Smith (b)*.

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ALDERSON, B.—I think the rule must be absolute for reviewing the taxation. The cases of set-off, which have been cited, govern the present; indeed they are stronger, because there it is in the option of the defendant to set off his counter claim or not; therefore the plaintiff must bring his action for the whole of his demand: yet in the two cases cited, it was taken for granted that the plaintiff's right of action is defeated to the extent of the set-off, and that the "sum recovered" in the action is only the balance. A multo fortiori, the plaintiff here is defeated to

(a) 5 Dowl. P. C. 385.

(b) 3 M. & W. 138.

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the extent of the money tendered, and the sum recovered is only the surplus. Those cases, therefore, must govern the present. I am not, however, to be considered as deciding that money paid into Court after action brought is not part of the sum recovered, but only that where the payment or tender amounts to matter of defence pro tanto, the sum recovered is only the difference.

Rulq absolute.

JAMES V. PRITCHARD.

The defendant having bought a rick of hay from the plaintiff, (who was the executor de son tort of M. S.), before payment of the price, received a notice from a third party, stating that he was the administrator of M. S., and demanding payment of the sum for which it had been sold. The defendant being subsequently sued by the plaintiff for the price of the hay:—*Held*, that he was not entitled to relief under the Interpleader Act, 1 & 2 Will. 4, c. 58, s. 1.

THIS was an action of debt, to recover the price of a rick of hay agreed to be sold by the plaintiff to the defendant. In the early part of this term, *Montagu Chambers* obtained a rule under the first section of the Interpleader Act, 1 & 2 Will. 4, c. 58, calling on one William Saunders to appear and state the particulars of his claim. The affidavit of the defendant, in support of the motion, stated, that on the 7th of April, 1839, he agreed with the plaintiff for the purchase of the hay in question: that on the 21st of June last, seven days before the commencement of this action, he was served with a notice by the attorney of Saunders, informing him that the hay had belonged to one Martha Simlett, deceased, to whom Saunders had taken out administration; that he only was entitled to receive the price of the hay, and that if the defendant should pay it over to any body else, Saunders would nevertheless hold him accountable for the amount, and take immediate steps to recover it: that in consequence of such notice, the defendant did not know to whom the said hay belonged, or to whom he was liable for the same: that this action was commenced on the 29th of June last, and the declaration delivered on the 26th of October; and that the defendant had not pleaded to the

action. The affidavit then proceeded to state that the defendant expected to be sued by Saunders for the value of the hay, and to deny collusion with Saunders.

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E. V. Williams now appeared for the plaintiff, (who claimed as executrix de son tort of Martha Simlett), and contended that the case was not within the Interpleader Act.—A purchaser cannot call upon his vendor to interplead with a third party. The plaintiff merely claims the performance of a contract made with her by the defendant, and of which the defendant has received the benefit. [*Alderson, B.*—That seems to be an answer to the application. If the circumstances amount to a defence for the defendant, he should plead them.] The Court then called on

Chambers, for the defendant.—The defendant is within the words and intent of the Interpleader Act. He is merely in the condition of a stakeholder, claiming no interest in the money which both these parties are calling upon him to pay, but being willing to pay it to whichever of them shall appear to be entitled to it. [*Alderson, B.*—He has entered into a contract to pay the plaintiff. He must either perform that contract, or set up some defence which may justify him in refusing payment.] The money belongs to the administrator. As against an executor de son tort, the rightful representative is entitled to the estate, and the produce of it: this is an invalid contract, with which the rightful administrator may intervene; and here the letter written on his behalf claims the money as part of the estate, and amounts to an affirmation of the contract. Besides, it is clear that the act of Parliament was intended to apply to cases of adverse claims in which a bill of interpleader might have been maintained; and here it might, this being a case in which two parties “are claiming the same thing by different or

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separate interests, and another person, not knowing to which of the claimants he ought of right to render a debt or duty, or to deliver property in his custody, fears he may be hurt by one of them." (a).

ALDERSON, B.—I think the rule must be discharged, and that this is not a case within the Interpleader Act. The defendant has made a bargain with the plaintiff, and he must perform it, or shew good cause why he does not.

Rule discharged, with costs.

(a) Mitford's Eq. Pl. p. 39 (3rd edit.).

LANDER v. GORDON.

Where a Judge at Nisi Prius has granted a certificate for speedy execution, under the stat. 1 W. 4, c. 7, s. 2, and final judgment has been signed accordingly, the Judge has no power afterwards to order a stay of proceedings.

THIS cause was tried at the last Summer Assizes for Surrey, before *Gurney*, B., and a verdict having been found for the plaintiff, the learned Judge, before the end of the Assizes, certified under the stat. 1 Will. 4, c. 7, s. 2, that execution should issue in a month. The certificate was dated the 7th of August. On the 31st of August final judgment was signed. On the 5th of September, the same learned Judge, on an application made to him at chambers on behalf of the defendant, ordered that all proceedings in the action should be stayed until the 5th day of this term (November 6), and that the defendant should in the mean time give the plaintiff security for a certain amount of the damages and costs. On the 5th of November, *James* obtained a rule to shew cause why this order should not be set aside.

Platt and *Montagu Chambers* now shewed cause, and contended that, independently of the stat. 1 Will. 4, c. 7,

the Court or a Judge had power, at any stage of a cause, to stay the proceedings, where the equity or justice of the case in his judgment required it: that the 2nd section of that statute, which gave the Judge at Nisi Prius power to certify for speedy execution, did not imply any limitation of his independent authority to stay the proceedings: and that the 4th section, which empowered the Court, in term time, to vacate the judgment, and to stay or set aside the execution, was equally consistent with the Judge's power, antecedently to the term, to stay the course of the proceedings on his certificate: at all events, this rule ought to be discharged, as having been unnecessarily obtained, since it was not returnable until after the expiration of the time named in the Judge's order.

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James, contra.—A Judge has no power, after judgment has been signed, to rescind his certificate for speedy execution, or to stay the proceedings upon the judgment. The power of certifying must, according to the second section, be exercised before the end of the sittings or assizes; and upon that certificate judgment may be signed *forthwith*, the period of issuing execution thereon being determined by the terms of the certificate. After the end of the sittings or assizes, the Judge is *functus officio* as to that certificate. If the defendant seeks to annex to it any condition or qualification, he ought to make the application during the assizes. It is inconsistent with the object of the statute, that after the plaintiff has obtained a judgment, and the time for reaping the fruits of it has been postponed, (which is in effect a stay of proceedings), a Judge should have power to postpone it a second time. Then the 4th section, which provides that “notwithstanding any judgment signed or recovered, or execution issued by virtue of this act, it shall be lawful for *the Court* in which the action shall have been brought to order such judgment to be vacated, and execution to be stayed or set

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aside, &c., as justice may appear to require," obviously implies that a Judge alone has no such authority. The power there given to the Court would be idle and nugatory, on any other supposition than that of the Judge at *Nisi Prius* being divested of all authority after the granting of his certificate, or at all events after the end of the assizes. It is analogous to cases under the Interpleader Act, 1 & 2 Will. 4, c. 58, under which, until the amendment introduced by the stat. 1 & 2 Vict. c. 45, s. 2, the Court only, and not a Judge at Chambers, could give relief. [*Alderson, B.*—A Judge who has certified under the 84 Eliz. c. 6, to deprive a plaintiff of costs, may rescind his certificate within a reasonable time.] That is upon the particular terms of that statute; but it cannot be annulled after final judgment (*a*). Here judgment has been signed before the order complained of was made. This was in effect granting a new certificate extending the time, after the end of the assizes.

ALDERSON, B.—This is a question of some importance as to the power of the Judge, and I will consult the other Judges of this Court before I decide. The motion, however, is quite useless, and therefore there should be no costs on either side. [The learned Baron shortly afterwards retired from the Court, for the purpose of consulting the other Judges; and on his return, said]—I am of opinion that this rule must be discharged, as being useless, without costs. As to the question which has been argued before me, I am of opinion, that when once final judgment has been signed, the power of the Judge is at an end, and the execution follows as of right according to the terms of the certificate, which the Judge has no power afterwards to alter. The party has a right to have the amount of the judgment secured to him, and that right cannot be

(*a*) *Whalley v. Williamson*, 7 Scott, 135; 5 Bing. N. C. 200; 7 Dowl. P. C. 253.

affected by any act of the Judge after judgment has been signed. I am confirmed in this opinion by at least one other member of the Court. In this particular case, however, this rule became useless, and ought therefore to be discharged. The plaintiff might have disregarded the Judge's order altogether, and gone on with his execution notwithstanding.

Rule discharged, without costs.

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GREENWAY v. TITCHMARSH.

ASSUMPSIT on the warranty of a horse. The declaration alleged as special damage, that the plaintiff had been put to great charges and expenses in the keep of the horse. Pleas, first, non assumpsit; secondly, that the plaintiff did not buy of the defendant, nor did the defendant sell to the plaintiff, the horse in the declaration mentioned: on which issues were joined. The venue had been changed by the defendant, on the ordinary affidavit, from Middlesex to Hertfordshire, but had been brought back to Middlesex on the usual undertaking of the plaintiff to give material evidence in that county. At the trial before Lord *Abinger*, C. B., at the Middlesex sittings after last term, the question in dispute between the parties was, whether the horse had been bought by a person named Grout on his own account, or as the agent of the plaintiff. Grout bought the horse of the defendant at Biggleswade fair in Bedfordshire, on the 14th of February, 1840, with a warranty of soundness. On the 4th of March following, he first saw the defendant again at Royston fair in Hertfordshire, and told him that the horse was unsound, and that he would be required to take him back. On the 5th of

An undertaking to give material evidence of some matter in issue arising in a particular county, is satisfied by evidence arising in that county, which bears on the amount of damages.

In an action for breach of warranty of a horse, in which the issue raised on the pleadings was, whether the plaintiff bought the horse of the defendant or not, payment in Middlesex of the keep of the horse, after notice to the defendant of its unsoundness, was held sufficient to satisfy the undertaking to give material evidence in that county.

Quære, whether a letter of the plaintiff's attorney to the defendant, written in Middlesex, but posted in London, giving notice of the unsoundness, and requiring the defendant to take back the horse, otherwise it would be sold by a certain day, (verbal notice to the same effect having been previously given to him), was sufficient to satisfy such undertaking?

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March, the plaintiff's attorney wrote, in Middlesex, a letter addressed to the defendant, which was posted in London, informing the defendant that the horse was unsound, and demanding back the price of it, and giving him notice that unless the amount were paid, and the horse taken away, by a certain day, the horse would be sold, and proceedings would be commenced for the difference. The horse remained for some days after this date on the premises of Grout, in Surrey, where it was provided by him with food and stabling, the charges for which were paid by the plaintiff at Enfield in Middlesex. On the 11th of March, the horse was sold by the plaintiff pursuant to the notice given in the letter of the 5th, and this action was brought to recover the difference between the sum for which he was so sold, and the amount of the price paid for him to the defendant, and of the expenses of his keep up to the time of the re-sale. It was objected for the defendant, that the plaintiff ought to be nonsuited, on the ground that he had not complied with his undertaking to give material evidence of some matter in issue arising in the county of Middlesex. The Lord Chief Baron reserved the point, and the case being left to the jury, they found a verdict for the plaintiff for the full amount claimed in the action.

In the early part of this term, *Kelly* obtained a rule nisi for a nonsuit, pursuant to the leave reserved at the trial: against which

Erle and *Miller* now shewed cause.—The actual *issue* in the cause was, whether the plaintiff bought the horse of the defendant or not; but it was a necessary part of the duty of the jury to determine, if they found that question in the affirmative, to what damages the plaintiff was entitled; it was material, therefore, to ascertain from what period the defendant had notice of the unsoundness, so as to entitle the plaintiff to recover the expenses of the keep

of the horse from that time. For that purpose, the letter of the 5th of March, which was written in Middlesex, was material evidence in that county. *Collins v. Jenkins* (a) was a case much resembling the present in its circumstances. There, in an action on the warranty of a horse, a letter written by the plaintiff's attorney in Middlesex, apprising the defendant of the breach of warranty, and that the horse was standing at livery at the defendant's expense, coupled with an admission by the defendant's agent in Middlesex of the receipt of that letter, was held a sufficient compliance with an undertaking to give material evidence of some matter in issue arising in Middlesex, on the ground that its effect was to increase the damages, by rendering the defendant liable for the keep of the horse, in case the warranty were established. That case was decided on the authority of *Curtis v. Drinkwater* (b), where, in an action against a coach proprietor for negligence in conveying the plaintiff from Oxford to Leominster, the injury having happened to the plaintiff in Oxfordshire, it was held that inconvenience suffered and expense incurred by the plaintiff in Worcestershire, was material evidence of a matter in issue arising in that county, within the meaning of the undertaking. It seems to be established, therefore, that if the evidence bears materially on the quantum of damages, it is material within the meaning of the undertaking, although it does not go to the verdict. The "matter in issue" means all that the jury are to determine. It may be said the letter was unnecessary, because a parol notice had before been given to the defendant at Royston fair. But the written evidence is not the less material because the fact may perhaps be proved by parol also; the witness who is to prove the parol communication may fail or be discredited. Besides, the letter was material, as shewing that the plaintiff dealt with the horse as *his*, and assumed to sell it. [*Parke, B.*—The

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(a) 4 Bing. N. C. 225; 5 Scott, 589.

(b) 2 B. & Adol. 169.

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letter was *written* in Middlesex, but the communication to the defendant *by the post* is the material thing, and that was done in London.] The letter was dispatched to the post in Middlesex, and that was part of its transit to the defendant. Suppose the plaintiff had been obliged to give secondary evidence of the letter, he must have called the clerk who took it to the post from the office in Middlesex.—On this point they cited *Linley v. Bates* (a).

But secondly, the payment for the keep at Enfield was clearly material evidence to satisfy the undertaking: *Curtis v. Drinkwater*.

Kelly and Byles, contra.—The argument on the other side is, that where any damage is proved in the county in which the venue is retained, that is sufficient. That is laying down the rule much too broadly. The undertaking is, to give “material evidence of some *matter in issue*” arising within that county. *Curtis v. Drinkwater* is distinguishable. There the inconvenience and expense incurred by the plaintiff were part of the *injury done*, without proof of which the action was not maintainable. It was, therefore, not merely matter in aggravation of the damages in Oxfordshire, but an integral part of the cause of action in issue. The mere negligence of the defendant would have given no cause of action, without the injury arising from it. But here the cause of action in issue is the making of the promise by the defendant—the buying of the horse; and the action would be maintainable without any damage. The evidence of the payment for the keep was wholly unnecessary: after proof of notice to the defendant, the plaintiff would be entitled to the reasonable expenses of the keep, wherever the horse was kept, and whether they were paid or not. The plaintiff can only recover a reasonable sum, for such time as would be required to resell the horse to the best advantage: *M^r Kenzie v. Hancock* (b).

(a) 2 C. & J. 659.

(b) Ry. & M. N. P. C. 436.

[*Parke, B.*—Of which the actual payment may be shewn as the just measure.] *Esch. of Pleas, 1840.*

Secondly, as to the letter. It is admitted that the defendant had before had verbal notice of the unsoundness: could the subsequent written notice be material? It is said the witness to prove the verbal notice might be unsatisfactory; but he was not discredited in this case. But further, the mere sending of the letter from the office in Middlesex is not sufficient. In *Collins v. Jenkins*, there was an admission of the receipt of it in Middlesex—here it was only written in Middlesex. The fact to be proved is, that the defendant had notice: it is immaterial to that fact where the letter was written. [*Lord Abinger, C. B.*—The notice is proved by two things, one done in Middlesex, and one in London.] The putting it into the post is the evidence (as in *Linley v. Bates*) to shew the receipt of it; the contents speak for themselves.

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LORD ABINGER, C. B.—I think this rule must be discharged. We are not considering the policy of the rule of law relating to this subject; it is sufficient to abide by the decided cases, more especially on a question of this nature. The law permits the plaintiff to try certain actions in any county; and where the action chiefly consists in damages, it is much better to bring it in the county where the damages accrued, and where the witnesses reside. Now the Courts have considered the undertaking to give material evidence in a particular county, as going, not merely to the actual question in issue on which the verdict depends, but also to the damages, as being a "matter in issue" between the parties. If this case stood upon the letter only, it might be doubtful whether that would be sufficient; although it would seem that the writing of the letter would be material in order to shew the answer to it, or the inference to be derived from there being no answer. That admission by the silence

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of the defendant could but be put to the jury, without shewing that the letter was written. But at all events, the evidence of the payment for the keep of the horse fulfilled the plaintiff's undertaking, as being material to the damages.

PARKE, B.—I agree that the rule must be discharged. The case of *Collins v. Jenkins* shews, that the evidence to be given under an undertaking like the present is not confined to the mere issue in the cause, but includes also the question of damages, which are to be considered for this purpose as a matter in issue between the parties. Here part of the amount claimed and recovered by the plaintiff was paid in Middlesex, and that payment was good evidence on the question whether the sum claimed was a reasonable amount or not. If the case had stood merely on the letter, I should have had considerable doubt.

GURNEY, B., concurred.

ROLFE, B.—I am of the same opinion. What the plaintiff has to shew is, the reasonable expenses which he is liable to pay for the keep. It is cogent evidence of that, to shew what he actually did pay.

Rule discharged.

DOE *d.* BENNETT *v.* TURNER.

Where A., in 1817, let B. into possession of lands as tenant at will; and in 1827, A. entered upon the land without B.'s consent, and cut and carried away stone therefrom:—*Held*, that this entry amounted to a determination of the estate at will; and that B. thenceforth became tenant at sufferance, until, by agreement express or implied, a new tenancy was created between the parties: and therefore, that unless the fact of such new tenancy were found by the jury, an ejectment brought by A. in 1839 was too late, inasmuch as, by the stat. 3 & 4 Will. 4, c. 27, s. 7, his right of action *first* accrued at the expiration of one year after the commencement of the original tenancy at will, i. e. in the year 1818.

AT the trial of this ejectment, at the last assizes for the county of Gloucester, before *Parke*, B., it appeared that

the lessor of the plaintiff, who was admitted to have been in the year 1817 the owner of the lands in question, in that year let the defendant into possession of them as tenant at will. In the year 1827, the defendant being still in possession, the lessor of the plaintiff entered upon the land, and took and carried away a quantity of stone from a quarry on the estate. The defendant, however, continued in possession as before, until the year 1839, when the lessor of the plaintiff, after the expiration of six months' notice to quit, brought this ejectment to recover possession of the property. It was contended for the defendant, that the action was brought too late, the right of the lessor of the plaintiff having been, under the provisions of the stat. 3 & 4 Will. 4, c. 27, ss. 2 & 7, barred at the expiration of twenty-one years from the commencement of the original tenancy in 1817. The learned Judge, however, thought that the original tenancy at will was determined by the entry in 1827, if it was without the tenant's consent; that a new tenancy at will was then created, and that, consequently, the ejectment was well brought within twenty-one years from that period. It was then objected that the plaintiff was precluded, by his having given a notice to quit, from treating it as other than a tenancy from year to year. The learned Judge thought that the lessor of the plaintiff was not concluded thereby, and left it to the jury to say, first, whether the defendant was tenant at will, or from year to year; and next, whether the act done by the plaintiff in 1827 was or was not done with the consent of the defendant. The jury found that the defendant was tenant at will, and that the entry in 1827 was without his consent, and the verdict was thereupon entered for the plaintiff.

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At the commencement of this term, *Kelly* obtained a rule nisi for a new trial, on the ground of misdirection; against which, on a subsequent day,

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The Attorney-General, Ludlow, Serjt., W. J. Alexander, and Talbot, shewed cause.—The question is, whether, under the circumstances of this case, the lessor of the plaintiff is barred by lapse of time from recovering in this ejectment. It is admitted that the original possession of the defendant, from 1817 to 1827, was as tenant at will. Nor can it be disputed that that tenancy at will was determined by the entry of the lessor of the plaintiff, and the taking and carrying away of the stone, in 1827. It is clearly laid down in Co. Litt. 55. b, that “if the lessor, without the consent of the lessee, enter into the land, and cut down a tree, this is a determination of the will, for that it should otherwise be a wrong in him; unless the trees were excepted, and then it is no determination of the will, for then the act is lawful albeit the will doth continue.” So, in *Ball v. Cullimore* (a), it was held that a feoffment by lessor, with livery of seisin on the land, operates as a determination of the will, although the tenant at will be off the land at the time when the livery is made, and have no notice of the determination of the will. The Lord Chief Baron there lays it down as the general rule of law, that any act done upon the land by the lessor, in assertion of his title to the possession, determines the will. The length of time during which the lessor continues in possession is immaterial; having actually entered, the pre-existing estate at will is absolutely determined, and the occupation of the party is thenceforward under a new tenancy at will. Under these circumstances, the stat. 3 & 4 Will. 4, c. 27, is clearly no bar. The second section of that statute enacts, generally, that after the 31st of December, 1833, no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or

(a) 2 C., M. & R. 120.

distress, or to bring such action, shall have first accrued to the party, or to some person through whom he claims. Then section 7 defines the period at which the right to bring an action shall be deemed to have first accrued, in the case of a tenancy at will; viz., "either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined." That is, if the will be determined by any act of the lessor, then the twenty years shall be computed from that act done; if not, then they shall be computed from the expiration of one year next after the original commencement of the tenancy. Here the will was determined by the entry of the lessor in 1827, and he then re-demised to the defendant at will; he has, therefore, twenty-one years from that period in which to bring his ejectment. The argument on the other side must go to this, that the fact of the determination of the tenancy in 1827 must be struck out of the case, and that there has been a continuous holding by the defendant since his first period of possession in 1817, from which date the time is to be computed. But in order to defeat the right of the lessor, there must have been, not only a continuous holding, but a continuous *tenancy at will*, for twenty-one years. Here, however, there has been, within twenty years, not only an interval during which the tenancy at will was suspended, but an actual change of the possession. [*Rolfe*, B.—It does not seem to be necessary to decide whether the defendant continued to be *tenant at will* after 1827; if he were a trespasser, or a tenant from year to year, it is the same. *Parke*, B., referred to section 10, which enacts, that no person shall be deemed to have been in possession of any land, within the meaning of the act, merely by reason of having made an entry thereon.] That was to do away with the old doctrine of entry and continual claim,

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ch. of Pleas, but has no application to the 7th section, in which nothing
 1840. is said about being in possession of the land.

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Kelly, R. V. Richards, and Gray, contra.—In the first place, it ought to have been left to the jury to say whether the entry in 1827 was made with an intention to determine the tenancy at will. The law does not say that every entry on the land by the lessor is a determination of the will, without an intention on his part to determine it. The assent or dissent of the lessee makes no difference; otherwise the lessor could not go on the land at all without the assent of the tenant. The law prevents the lessor from being a *trespasser* by going upon the land; but, although it is commonly said that his entry on the land determines the will, that must be taken sub modo, when the entry is made with the intention to determine it. [Parke, B.—Any act of ownership on the land which is not excused at the time, is a determination of the will: Co. Litt. 245. b.] The lessor has a right to say, rather than be treated as a trespasser, that he entered to determine the will; but that is only in case the tenant chooses to treat him as a trespasser. It was not found that the taking of the stone in 1827 was *against* the consent, but *without* the consent, of the defendant; i. e., without his first consenting. That did not necessarily shew that it was an adverse act. There was nothing to convey to his mind that anything was done or intended to be done to the disturbance of his possession.

But, assuming that the original tenancy at will was determined in 1827, it was not a new tenancy *at will* that was then created, but the defendant became tenant *at sufferance*, and there was nothing to shew that the character of his occupation was subsequently changed. If so, the statute ran from the expiration of a year after the commencement of the only tenancy at will, viz., that which

commenced in 1817. In Com. Dig. Estates, (Tenant by Sufferance, I. 1), it is said, "Tenant by sufferance is he who enters by lawful demise or title, and afterwards wrongfully continues in possession." . . . "So any, who continues in possession after a particular estate is ended, without agreement." So, in Vin. Abr. Estate, (Tenant at Sufferance, D. c.), "If a man leases at will and dies, and afterwards lessee continues in possession, though the lease was determined by the death of the lessor, yet lessee is tenant at sufferance." Again, (Lease at Will, S. b. 2), "There cannot be tenant at will till there is agreement of both parties, or till there is an entry." For this reason it is that there cannot be a tenant at sufferance to the Crown, because it is said to be the laches of the lessor to suffer his lessee at sufferance to continue in possession of the land after his term, which laches cannot be imputed to the Crown: *Finch's case* (a). Even "a bare agreement that J. S. shall have the land," will not amount to a lease at will: *Munifas v. Baker* (b): there must be some act done between the parties, in order to commence a tenancy at will. [Parke, B.—Conceding that to be the law, and that here there was no evidence of a new tenancy at will, the question is, what effect that has on the plaintiff's right to recover. That depends on the construction to be put on the 7th section of the 3 & 4 Will. 4, c. 27.] Here the defendant was tenant at will from 1817 to 1827, and no longer; he was, therefore, within the operation of the 7th section, and the right of entry or action accrued in 1818; because, to satisfy the words of that section, the determination of the tenancy at will must be deemed to have occurred at the expiration of one year next after its commencement. The lessor, for the purpose of the limitation imposed by the statute, is at all events to be considered as having entered at the end of a year. If it be otherwise,

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(a) 2 Leon. 143.

(b) Keb. 26.

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then, by some act of which the tenant is altogether ignorant, the lessor may have a period of forty instead of twenty years within which to sue, and that without any evidence of acknowledgment of his title. The 7th section was framed chiefly for the purpose of protecting the possession of small patches of land taken from commons, &c., of which the parties might have been allowed to remain in possession without interruption for a long period, but of which it would be difficult to prove the commencement of the holding. The reasonable construction, therefore, is, that in any event the right of action shall accrue *ultimately* at the end of a year from the commencement of the tenancy, though it may accrue sooner by the actual determination of the will. This construction is strengthened by reference to the 8th section, which, in the case of a parol tenancy from year to year, provides that the right of the party shall be deemed to have *first* accrued at the determination of the first of such years, or at the last payment of rent, which shall *last* happen. Here, therefore, the right of the lessor of the plaintiff *first* accrued in the year 1818, more than twenty years before the commencement of this action.

Cur. adv. vult.

The judgment of the Court was afterwards delivered by

PARKE, B.—The question in this case was, whether the lessor of the plaintiff was barred by lapse of time from recovering the property in dispute. It appeared on the trial, that the lessor of the plaintiff had let the defendant into possession of the land in question, as tenant at will, in the year 1817. In the year 1827, he entered on the land without the consent of the tenant, and cut and carried away stone therefrom. This was undoubtedly a determination of the tenancy at will, for the reason given in Co. Litt. 55. b., viz., that otherwise it would be a wrongful

act. Notwithstanding this determination of the tenancy at will, the defendant continued in possession of the land as before, and the lessor of the plaintiff did not bring his ejectment till the year 1839, being twenty-two years from the time when the defendant first became tenant at will. The jury found, that during the whole period from 1817 to the bringing of the action, the defendant was tenant at will to the lessor of the plaintiff. It was contended on behalf of the defendant, that the action was brought too late, for that the right of the lessor of the plaintiff was, under the provisions of the statute 3 & 4 Will. 4, c. 27, barred at the end of twenty-one years after the commencement of the original tenancy in 1817. By the 2nd section of that statute it is enacted, that no person shall bring any action to recover any land, but within twenty years next after the right to bring such action shall first have accrued; and by the 7th section it is enacted, that when any person shall be in possession of any land as tenant at will, the right of the person entitled, subject thereto, to bring an action to recover such land, shall be deemed to have *first* accrued, *either* at the determination of such tenancy, *or* at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined. The defendant therefore argued, that the right of the lessor of the plaintiff to bring his action *first* accrued, according to the provisions of the 7th section, in the year 1818, being one year after the commencement of the tenancy; and that by the express enactment of the second section, the action could only be commenced within twenty years of that time, i. e., in or before the year 1838; whereas in fact the present action was not commenced till the following year, 1839. It appears, however, to the Court, that this view of the case, attending to the finding of the jury, and if that be correct, and a new tenancy at will was created in 1827, cannot be sustained. If, indeed, the tenancy throughout the whole period had been one

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continuous tenancy at will, or if, when the original tenancy at will was determined in 1827, no new tenancy at will had been created, but the tenant had continued to occupy merely as tenant by sufferance, then the reasoning of the defendant would be correct. In either of those cases, the right to bring an action, which, by the express provision of the 7th section, undoubtedly accrued to the lessor of the plaintiff in 1818, would have continued uninterrupted during the succeeding twenty years, and not having been exercised during that period, would have been barred. But the facts of the present case, if the finding of the jury be taken to be correct, exclude both hypotheses, on one or the other of which the defendant's argument must rest. There was not a continued tenancy at will, for the will was determined in 1827. There was not a tenancy by sufferance, for the jury have found that the defendant was all along tenant at will. The finding of the jury necessarily supposes, that, after the determination of the will in 1827, a new tenancy at will was constituted. The effect of this was to destroy the right of action which had accrued in 1818, for it is clear that after creating a new tenancy at will, the lessor of the plaintiff could bring no action until that new tenancy was determined. This construction is in strict conformity with the language of the 7th section, which provides that the right of action shall accrue at the end of the first year next after the commencement of *such* tenancy; i. e., of the tenancy under which the tenant is actually holding, not at the end of one year next after the commencement of any preceding tenancy. The consequence is, that the lessor of the plaintiff had twenty years from the year 1826, for bringing his ejectment, and was therefore not affected by the statute. But we think that the present finding of the jury cannot be fully relied upon. I certainly did not direct the attention of the jury, on the trial, to this point—that the effect of a determination of the will was to make a tenancy by sufferance only,

during which the landlord might have brought his ejectment without any demand of possession, or other act; and such tenancy at sufferance would continue until the parties created a new tenancy at will, by fresh agreement between them, express or implied. Slight evidence would probably satisfy a jury that a relation so inconvenient as that of a tenancy by sufferance, in which the tenant is not entitled to the fruits of his own industry, as he has no right to emblements (*a*), would not be long continued. But as this point was not submitted to the jury, we think the defendant, if he thinks it worth while to insist upon it, is entitled to a new trial, in which the question for the jury will be, whether a new tenancy at will was created, after the determination of the old one in 1827.

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Rule absolute for a new trial.

(*a*) Vin. Abr. Emblements, 79.

BLOOR v. DAVIES and BLOOR.

DEBT on bond, in the penal sum of £2000, brought against the defendants as the devisee and heir of Thomas Bloor, deceased. Plea, by the defendant Davies, non est factum: by the defendant Bloor, *riens per descent*. At the trial before *Patteson, J.*, at the Denbighshire Summer Assizes, 1839, the defence on the part of the defendant Davies, the devisee, was that the signature of the testator to the bond was a forgery. Many witnesses were called on both sides to speak to their knowledge of the handwriting, and among those called for the defendant was a grand-daughter of the testator, who stated on the *voir dire* that she was entitled under his will to an annuity of £10 for her life, charged upon his real property (which it appeared was of consider-

In an action of debt against a devisee on a bond of his testator, in which the question is whether the signature of the testator is a forgery or not, a party entitled, under the testator's will, to an annuity charged on his real estate, is not a competent witness for the defendant.

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able value). The witness was thereupon objected to as being incompetent, by reason of her interest to prevent the funds applicable to the payment of the annuity from being diminished by the plaintiff's obtaining judgment in this action: and the learned Judge (after referring to the stat. 1 Will. 4, c. 47, s. 2,) being of that opinion, rejected the witness. A verdict having been found for the plaintiff,—

Welsby, in the following Michaelmas Term, obtained a rule nisi for a new trial, on the ground that the evidence ought to have been received:—relying on *Nowell v. Davies* (a). In last Easter Term,

Jervis and *W. Yardley* shewed cause.—The witness was properly rejected. The case of *Nowell v. Davies*, upon which the defendant relies, appears to have been decided altogether upon the supposed authority of *Paull v. Brown* (b), from which Lord *Denman* says “there is no distinguishing it:” and no other reasons are given for the decision. *Paull v. Brown* was an action by an executor for a debt due to the intestate, and a creditor of the intestate was held to be a good witness for the executor to prove the debt, on the ground, as stated by *Mansfield*, C. J., that it was not distinguishable from the case of an action by the intestate himself, for whom his creditor would clearly have been a witness. *Nowell v. Davies*, on the other hand, was an action against executors for a debt of the testator, in which an annuitant under the will was held not to be disqualified by interest from giving evidence for the executors. But supposing the authority of *Paull v. Brown* to have been applicable, it may be questioned whether the doctrine laid down by *Mansfield*, C. J., be a sound one. After the death of the testator or intestate, the creditor has nothing further to look to than the speci-

(a) 4 B. & Adol. 368.

(b) 6 Esp. 34.

fic limited fund of which the estate consists, which cannot be altered by future circumstances, and which he comes to increase by his evidence; but that is not the case during the life of the debtor—his estate is fluctuating until his death. It may well be doubted, therefore, whether *Nowell v. Davies* was well decided. It is further to be observed, that in that case it did not appear whether the annuity was charged on the real or personal estate. [Lord Abinger, C.B.—It does not appear that there was any real estate.] There are also some other authorities which will probably be referred to on the other side, but they all appear to be distinguishable from the present. In *Carter v. Pearce* (a), which was an action against an administratrix for work and labour, &c., a co-obligor in a bond to the ordinary, under the 22 & 23 Car. 2, c. 10, was held a competent witness to prove a tender by the administratrix: and the Court said, that even if a creditor of the administratrix had been offered as a witness, there could have been no objection to his evidence being received. *Buller, J.*, said, that in order to shew the witness to be interested, it was necessary to prove that he must derive a *certain* benefit from the determination of the cause one way or the other; whereas, supposing there were no assets, though the defendant would be answerable for the costs, she would not be liable on her bond to the Ecclesiastical Court. In *Davies v. Davies* (b), *Parke, J.*, ruled, that on a plea of plenè administravit to an action against an administratrix, an unsatisfied creditor of the intestate was a competent witness for the defendant: putting it on the same ground as in *Paull v. Brown*, that he would have been a competent witness for the intestate, if alive, and that there was no ground of distinction between the cases. This question was raised also in the case of *Burghart v. Hall* (c), but the Court gave no

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(a) 1 T. R. 164. (b) Moo. & M. 345. (c) 4 M. & W. 727.

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judgment upon it. On the other hand, in *Craig v. Cundell* (a), Lord *Ellenborough* ruled, that, in an action at the suit of an executor or administrator, if the estate were insolvent, an unsatisfied creditor was not a competent witness for the plaintiff, as he came to create a fund out of which he might be satisfied. In *Baker v. Tyrwhitt* (b), the same learned Judge held, that in an action by an executor, the residuary legatee was not a competent witness for the plaintiff, and that he could not be made so even by releasing all claim to the debt sought to be recovered, having still an interest to support the action, that the costs might not be a charge upon the estate. So, in *Allington v. Bearcroft* (c), and in *Matthews v. Smith* (d), a party entitled to a distributive share of an intestate's estate was held not to be a competent witness in support of an action by the administrator. The present case, in fact, falls entirely within the principle which excludes the creditor of a bankrupt from giving evidence to support a claim by the assignees, because he comes to increase the fund out of which his dividend is to arise. [Lord *Abinger*, C. B.—There the law assumes that there are not funds to pay all the debts.] The Court will not inquire whether the estate be insolvent or not, in determining the question as to the competency of the witness. In *Nowell v. Davies*, *Parke*, J., says, "It is difficult to see how the solvency of the estate could make any alteration as to the competency of the witness."

But, further, the stat. 1 Will. 4, c. 47, s. 2, which provides that all wills, &c. concerning lands, shall be deemed, as against persons with whom the testator shall have entered into any bond, covenant, or specialty, binding his heirs, to be fraudulent and utterly void, clearly had the effect of making this witness incompetent; because she

(a) 1 Campb. 381.

(c) Peake's Add. Cas. 212.

(b) 4 Campb. 27.

(d) 2 Y. & J. 426.

came to shew, in effect, that this will is a good disposition notwithstanding the statute, by shewing that the bond on which the plaintiff sues is not a genuine instrument. If the bond be established, the will is void as against the plaintiff, and he will have execution against the land itself, out of which the witness's annuity is payable.

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Welsby, contra.—It may be admitted that there is no distinction in principle, as to the competency of the witness, whether the estate be solvent or insolvent; because otherwise the Court would be compelled, on every inquiry into the competency of a creditor or legatee, to take an account of the assets, which would lead to collateral inquiries almost interminable. But the case of a bankrupt differs in this respect from that of a party interested under a will, that there there is an *assumed insolvency*: the creditor or bankrupt *necessarily* comes to benefit himself. No such assumption will be made in the case of a creditor or legatee under a will. In *Clarke v. Gannon (a)*, where Lord *Tenterden* ruled, that in an action by executors for a debt due to the testator, a paid legatee was a competent witness for the plaintiffs, it was urged that he was inadmissible, inasmuch as he would be obliged to refund in case the estate should turn out to be deficient; but the learned Judge said that he could not assume that there was no other estate sufficient to pay the debts. The cases referred to on the other side are distinguishable, or must be taken to have been overruled by *Nowell v. Davies*. *Baker v. Tyrwhitt* was the case of a *residuary* legatee. A verdict for the executor would *necessarily* increase the residue; he stood, therefore, in a similar position to that of the creditor of a bankrupt. The same observation applies to the cases of parties entitled to a distributive share of an intestate's estate. *Craig v. Cundell* was decided on the ground of the insolvency of the estate; and *Parke, B.*, in

(a) Ry. & M. N. P. C. 31.

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Davies v. Davies, treats the dictum of Lord *Ellenborough* in that case as not being maintainable. *Nowell v. Davies* appears to be directly in point to the present case. But it is said that that decision is unsatisfactory, because it proceeds, according to the language of Lord *Denman* in giving judgment, altogether on the authority of *Paull v. Brown*. Even, however, if the language of the Lord Chief Justice may be considered open to observation, the decision itself, which was pronounced after a full argument, and time taken for consideration, must be taken as the deliberate judgment of the whole Court in favour of the competency of the witness. The Courts have of late adopted a much less narrow view of this subject than formerly; and it is not considered sufficient to disqualify a witness, that he will derive a great, probable, or even a certain benefit from the verdict; it must appear that some legal or equitable right of his will be affected thereby. In the case of *Burghart v. Hall*, this Court, in the first instance, refused the rule moved for a new trial on the ground of the incompetency of the legatee; and although it was afterwards granted, it was with a strong intimation of the opinion of the Court against the objection. In *Doe d. Wildgoose v. Pearce* (a), which was an ejectment by a party claiming an undivided interest in an estate under a will, the question in the cause being the competency of the testator, a party claiming another undivided interest in the same estate, under the same will, was held to be a competent witness for the lessor of the plaintiff, on the ground that the result of the verdict would not affect his rights; although he had doubtless the strongest possible interest in establishing the validity of the will. [*Parke, B.*—In that case of *Nowell v. Davies*, time was taken for consideration; and having been a party to the deliberation of the Court, I may say, that I believe the reason for the judgment was,—at least so far

(a) 5 M. & W. 506.

as I was a party, my reason certainly was,—that a verdict for the defendant could not be used by the witness, nor a verdict for the plaintiff against the witness, in a suit between that witness and the executor, on the ground that it was *res inter alios acta*. But I was afterwards satisfied that this was wrong; because a verdict and judgment for the plaintiff would have been admissible evidence for the executor, to prove a debt to that amount, and discharge the executor *pro tanto*, in a suit between him and the legatee, unless the verdict and judgment had been impeached on the ground of fraud: and I so stated on the argument of the case of *Burghart v. Hall*. The judgment, therefore, in *Nowell v. Davies*, so far at least as related to myself, proceeded on an untenable ground. The statute 3 & 4 Will. 4, c. 42, s. 26, which passed afterwards, removed this objection, by putting an end to the incompetency of a witness, on the ground of the verdict being evidence against him. But Sir *William Follett* contended, and, as I thought, rightly contended, in the case of *East v. Hall (a)*, that the legatee was not incompetent simply on the ground of the admissibility of the verdict; but that he was interested in the event of the suit, as having an interest in the fund itself, in the hands of the executor, which would be directly affected by a verdict for the plaintiff: and this consideration escaped attention, so far at least as I was concerned, in the case of *Nowell v. Davies*.] At all events, there having been no decision of the Court against the competency of a witness under such circumstances, the question is still open to consideration, and it must be admitted to be one of considerable importance.

The only remaining question is, whether, this being a devise of an annuity issuing out of the real estate, the case is affected by the operation of the statute 1 Will. 4, c. 47, s. 2. That statute only makes the will void pro

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(a) 4 M. & W. 727, n.

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tanto, as against the specialty creditor ; but the devisee is still entitled in equity to reimburse himself out of the personal estate, unless creditors would be prejudiced thereby (a). Here there is nothing to shew that there was not an ample fund, both real and personal, after the satisfaction of the debt on this bond ; and the Court will not assume the contrary.

Cur. adv. vult.

The judgment of the Court was now delivered by

Lord ABINGER, C. B.—This was a case in which a rule was obtained for a new trial, on the ground of the rejection of a witness, under circumstances which appeared at first sight to be similar to those of a case decided in the Court of King's Bench, *Nowell v. Davies*. That was an action against executors for a debt of their testator, and an annuitant under the will was held to be a good witness for the executors. But the present case was that of an action by a bond creditor of the testator against the devisee of his real estate, in which the object of the plaintiff is to have execution against the real estate, out of which same estate an annuity is payable to the witness under the will. The witness, therefore, was directly interested, for the object of her evidence was to prevent the plaintiff from recovering against the very estate devised for payment of her annuity. She had a direct interest in the result of the suit, not at all depending upon the question involved in the case of *Nowell v. Davies* ; and the rule must therefore be discharged, without reference to the authority of that case, or of the other cases referred to, upon which we say nothing.

Rule discharged.

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THE GREAT NORTH OF ENGLAND RAILWAY COMPANY v.
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DEBT for calls on shares subscribed for by the defendant. The first count of the declaration stated, that whereas the defendant, before the several times of making the several calls in this count, and in the second count hereafter mentioned, to wit, on &c., subscribed for a large sum of money, to wit, £5000, towards the undertaking mentioned in the said act (a), [6 & 7 Will. 4, c. cv.], and

In an action by a Railway Company for calls, the declaration alleged that "the defendant subscribed for a large sum of money, to wit, £5000, towards the undertaking mentioned in the act," &c. The Company

were empowered by the 3rd section of the act to raise a million of money for constructing and maintaining the railway; and by the 195th section it appeared that £660,000 had been subscribed for by several persons, under a contract binding themselves and their heirs, before the passing of the act. A motion having been made in arrest of judgment, on the ground that the declaration should have alleged a subscription by deed:—*Held*, that the declaration was good after verdict.

Scmble, that it would have been also good on special demurrer.

By the 121st section, the directors were empowered to make calls, the aggregate amount not to exceed £100, and no call to exceed £10 upon each share, and an interval of three calendar months was to elapse between the days of payment of each call. It also required that twenty-one days' notice should be given of every call, by advertisement in certain newspapers, and enacted that all money so called for should be paid to such persons, at such times and places, as in the said notice should be appointed. A resolution of the directors was made for a call of £8 per share; but the resolution, although it mentioned the period within which the call was to be paid, did not specify the place where, or person to whom, the payment was to be made. The notice of that call, inserted in the local newspapers, according to the directions of the act, specified the time and place of payment and the persons to whom the payment was to be made:—*Held*, first, that the publication of the notice must be assumed to be the act of the directors; secondly, that the call was properly made.

(a) The following sections of the act are those which were most material to the case:—

Section 3 enacts, "That it shall be lawful for the said Company to raise amongst themselves any sum of money for constructing and maintaining the said railway and other works by this act authorized, not exceeding in the whole the sum of one million pounds, the whole to be divided into shares of £100 each, and each share shall be num-

bered, beginning with number one, in arithmetical progression, and every such share shall be distinguished by the number to be applied to the same, and the said shares shall be and are hereby vested in the several parties taking the same, and their several and respective successors, executors, administrators and assigns, to their proper use and benefit, proportionably to the sum they shall severally contribute, and all corporations and

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persons and their several and respective successors, executors, administrators, and assigns, who have subscribed, or shall severally subscribe for any such share, or such sum as shall be demanded in lieu thereof, towards the said undertaking, and other the purposes of the said subscription, shall be entitled to and receive in proportionable parts according to the respective sums so by them respectively paid, the net profits and advantages which shall arise or accrue from or by the rates, tolls, and other sums of money to be received by the said Company, as and when the same shall be divided by the authority of this act."

Section 100 enacts, "That the directors for the time being of the said Company shall superintend all the affairs thereof, and shall have the custody of and power to use the common seal of the said Company on their behalf, and shall have full power and authority to do all acts whatsoever for carrying into effect the purposes of this act, and for the management, regulation, and direction of the affairs of the said Company, or relative thereto, which the said Company are by this act authorized to do, except such as are herein required and directed to be done at some general or general special meeting of the said Company."—[Powers are then given to the directors to appoint and displace officers and servants, and to allow salaries, &c., and to meet and adjourn: five directors

are made necessary to constitute a meeting; all questions are to be determined by a majority of the members present; each director is to have but one vote, except the chairman, who is to have a casting vote; and the directors are to "keep a regular minute and entry of their proceedings at every meeting of the said directors," and account of all monies disbursed and received. The section then proceeds] "and shall regularly enter into some books to be from time to time provided at the expense of the said Company for that purpose, notes, minutes, or copies, as the case shall require, of such appointments, receipts, and disbursements, and of all contracts and bargains entered into or made by them, and of other their orders and proceedings, and which books shall be deposited with and kept under the care and direction of the said directors."—Proviso, that the directors shall not fix their own remuneration, and shall take security from persons having the custody or control of any money received by virtue of the act.

Section 103 enacts, "That the orders and proceedings of all meetings, as well general as special, of the said Company, and of the said directors and committees respectively, shall be entered in some book to be provided and kept for that purpose, and shall be signed by the chairman of such respective meetings; and such orders and proceedings, when so entered and

the line of their railway, and to make two branches therefrom, and for other purposes relating thereto, and for di-

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signed, shall be deemed original orders and proceedings, and shall be allowed to be read in evidence in all courts, and before all judges, justices, and others, and that without due proof of such respective meetings having been duly convened, or of the persons making or entering such orders or proceedings, being proprietors, or being directors or members of the committee, or of the signature of such chairman, as the case may be, all of which last-mentioned acts shall be presumed."

Section 119 enacts, "That the several parties who have subscribed, or who shall hereafter subscribe for or towards the said undertaking, shall, and they are hereby required to pay the sums of money by them respectively subscribed for, or such parts or proportions thereof as shall from time to time be called for by the directors of the said Company, under and by virtue of the powers of this act, at such times and at such places, and to such persons, as shall be directed by the said directors; and in case any party shall refuse or neglect to pay as aforesaid the money by him so subscribed for, or the part thereof so called for, it shall be lawful for the said Company to sue for and recover the same, with full costs of suit, in any courts of law or equity, together with interest on such unpaid sum of money, at the rate of £5 per centum, per annum from the time when the same was directed to be paid as aforesaid up to

the day of actual payment thereof."

Section 121 enacts, "That the directors to be appointed as aforesaid shall have power from time to time to make such calls of money from the subscribers to and proprietors of the said undertaking for the time being, to defray the expenses of and to carry on the same, as they from time to time shall find necessary, so that the aggregate amount of calls made or money paid for or in respect of any such shares shall not amount to more than the sum of £100 on any such share, and so that no such call shall exceed the sum of £10 upon each share which any corporation or person shall be possessed of or entitled unto in the said undertaking, and an interval of three calendar months, at the least, shall elapse between the day appointed for payment for one call and the day appointed for payment of another call, and twenty-one days' notice at the least shall be given of every such call by advertisement inserted in two or more Durham, Newcastle, and York newspapers, aforesaid; and all monies so called for shall be paid to such persons, at such times and places, and in such manner, as in the said notice shall be appointed; and the respective proprietors of shares in the said undertaking shall pay their rateable proportion of the monies to be called for as aforesaid, to such persons, and at such times and places, and in such manner as shall be ap-

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vers, to wit, fifty shares of £100 each in the said undertaking. And whereas the said Company, after the pass-

pointed as aforesaid; and if any proprietor for the time being of any such share shall not so pay such his rateable proportion, then and in such case, and as often as the same shall happen, he shall pay interest for the same after the rate of £5 per centum per annum, from the day appointed for the payment thereof, up to the time the same shall be actually paid; and if any proprietor for the time being of any such share shall neglect or refuse to pay such his rateable proportion, together with interest (if any), then or at any time thereafter it shall be lawful for the said Company to sue for and recover the same in any of his Majesty's courts of record, by action of debt or on the case, or by bill, suit, or information, or the said directors may, and they are hereby authorized to declare the shares belonging to such proprietor to be forfeited, and to order such shares to be sold: Provided nevertheless, that no advantage shall be taken of any forfeiture of any share in the said undertaking, until notice in writing under the hand of the clerk or treasurer of the said Company, that such share hath been declared forfeited, shall have been given or sent by the post unto or delivered to some inmate of the last known place of abode of the proprietor of such share, nor until the declaration of forfeiture of the said directors shall have been confirmed either at a general or special general meeting of the said Company,

such general or special general meeting being held after the expiration of three calendar months at the least from the day on which such notice of forfeiture shall have been given as aforesaid; and after such declaration of forfeiture shall have been confirmed by such general or special general meeting, the said Company, by an order to be made at the same or at any subsequent general meeting or special general meeting, shall have power to direct the said directors to dispose of the shares so forfeited, or any of them, in manner by this act directed; and the said directors may, in that case, sell and dispose of such shares at a public auction, or by private contract, or public tender, and together or in lots, or in such other manner and for such price as they may think fit, and a solemn declaration in writing, made by some credible person not interested, before any Justice of the peace, or before any Master or Master extraordinary in the High Court of Chancery, stating that such call had been made by the said directors, and that such notice had been given, and that such default in payment had been made in respect of the share so sold, and that the same share had been declared to be forfeited, and that such declaration of forfeiture had been confirmed in manner hereinbefore mentioned, shall be sufficient evidence of the facts therein stated, and the purchaser of such share shall not be bound to see to the

ing of the said first-mentioned act, to wit, on &c., and from thence continually until the commencement of this

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application of his purchase-money, nor shall his title to such share be affected by any irregularity of proceeding in reference to such sale, but such solemn declaration, and the receipt of the treasurer of the said Company for the price of such share, shall be sufficient evidence of title thereto for all purposes whatsoever."

Section 123 enacts, "That in any action to be brought by the said Company against any proprietor for the time being of any share in the said undertaking, to recover any money due and payable for or in respect of any call, it shall be sufficient for the said Company to declare and allege that the defendant, being a proprietor of a share in the said undertaking, is indebted to the said Company in such sum of money as the calls in arrear shall amount to, for a call, or so many calls, of such sums of money, upon a share belonging to the said defendant, whereby an action hath accrued to the said Company by virtue of this act, without setting forth the special matter; and on the trial of such action, it shall only be necessary to prove that the defendant, at the time of making such respective calls, was a proprietor of a share in the said undertaking, and that such call was in fact made, and that such notice was given as is directed by this act, without proving the appointment of the directors who made such calls, or any other matter whatsoever; and the said Company shall thereupon

be entitled to recover what shall appear due, including interest computed as aforesaid on such calls, unless it shall appear that any such call exceeded £10 per share, or was made payable before the expiration of three calendar months from the day appointed for payment of the last preceding call, or that notice was not given as hereinbefore required; and in order to prove that the defendant was a proprietor of such share in the said undertaking as alleged, the production of the book in which the clerk of the said Company is by this act directed to enter and keep the names and additions of the several proprietors from time to time of shares in the said undertaking, with the number of shares they are respectively entitled to, and of the several corporations and persons who shall from time to time become proprietors thereof, or be entitled to shares therein, shall be *prima facie* evidence that such defendant is a proprietor, and of the number and amount of his shares therein."

Section 183 enacts, "That in all cases in which it may be necessary for the said Company to serve any summons or demand, or any notice, or any writ, or other proceeding at law or in equity, or otherwise, upon any corporation or person, under the provisions of this act, personal service thereof respectively upon such person, or upon some member, or upon the clerk or other officer of such corporation, or delivering

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suit, have been and still are making and constructing the railway and other works in the said acts mentioned, and otherwise carrying the said acts into execution. And whereas also, after the passing of the said first-mentioned act, and whilst the defendant was such subscriber as aforesaid, and entitled to the said shares, to wit, on &c., the directors for the time being of the said Company, then duly appointed pursuant to the said first-mentioned act, made a certain call not exceeding £10 a share, to wit, a call of £8 a share, from the several subscribers to, and proprietors of, the said undertaking for the time being, upon and in respect of their respective shares therein, according to the said act, the same call being then found by the said directors to be necessary, and being then necessary, for defraying the expenses of and carrying on the said undertaking, and the aggregate amount of the said call, and all other calls made or money paid for or in respect of the said shares, not exceeding £100 on any share; which said call was then made payable by the said directors at a time before the commencement of this suit,

the same to some inmate of the last or usual known place of abode of such person, or of such member, clerk, or other officer of such corporation, or at the office of such clerk or other officer, shall be deemed good and sufficient service of the same respectively upon such corporation or person (as the case may be), except in cases in which any other mode of service is by this act particularly directed: Provided always, that every summons, demand, or notice, or other document, requiring authentication by the said Company, may be signed by the clerk or treasurer of the said Company, and need not be under the common seal of the said Com-

pany, and may be in writing or in print, or partly in writing and partly in print."

Section 195, after reciting "that the probable expense of making the said railway, and the other works hereby authorized, amounting to the sum of £660,000, has been already subscribed for by several persons under a contract binding themselves, their heirs, executors, administrators, and assigns, for the payment of the several sums by them respectively subscribed for," enacts, that the act may be put into execution immediately after the passing thereof.

and after an interval of three calendar months next after the day appointed for payment of any preceding call had elapsed; to wit, on &c. And whereas, after the making of the said call as in this count mentioned, and more than twenty-one days before the same was made payable as aforesaid, to wit, on &c., notice of the said call and of the time at which the same was made payable as aforesaid, was duly given by advertisement then inserted in the several newspapers following, that is to say, two Durham newspapers, respectively called, &c. [naming them], three Newcastle newspapers, respectively called, &c., &c., and three York newspapers, respectively called, &c., &c., according to the said first-mentioned act, in and by which said notice, a certain place in the said notice mentioned was appointed and notified for payment of the said call, at the said time at which the same was made payable as aforesaid, to the then treasurer of the said Company, to wit, &c., which period of twenty-one days next after the giving of the said notice elapsed before the commencement of this suit, whereby the defendant became liable to pay to the said Company a large sum of money; to wit, £400, being the amount of the said call upon and in respect of the said shares to which the said defendant was so entitled as aforesaid; yet the defendant hath not paid the said sum of £400, or any part thereof, or any interest thereon; whereby, and by virtue of the said first-mentioned act, an action hath accrued to the said Company to demand and have of and from the defendant the sum of £400, and interest thereon, after the rate of £5 for £100 for a year, from the time the same became payable as aforesaid, amounting to a large sum, to wit, £100.

The second count stated—That whereas also afterwards, and whilst the defendant was such subscriber as aforesaid, and entitled to the said shares in the said undertaking, and after the passing of the said acts, and whilst the said Company were so making and constructing the said rail-

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way and other works in the said acts mentioned, and otherwise carrying the said acts into execution as aforesaid, to wit, on the several days and times in this count in that behalf hereafter mentioned, the several calls in this count hereafter mentioned were respectively made by the directors for the time being of the said Company, according to the said acts, from the several subscribers to, and proprietors of, the said undertaking for the time being, upon and in respect of their respective shares in the said undertaking, the same calls being respectively, at the respective times of making the same, found necessary by the said directors, and being respectively then necessary for defraying the expenses of and carrying on the said undertaking, and no one of the said calls exceeding £10 a share, &c., and the aggregate amount of the same calls, and all other calls and money paid for or in respect of the said shares, not exceeding £100 on any share, which same calls respectively, at the respective times of making the same, respectively were, by the said directors, made payable before the commencement of this suit, on the respective days in this count in that behalf hereafter mentioned; that is to say, one call of £3 a share made on the 5th day of December, A. D. 1837, and payable on the 17th of January, A. D. 1838, [seven other calls were then specified in like manner]. The count then averred, that an interval of three calendar months at least had elapsed between the respective days of payment of the calls and between the day of payment of the first of the same calls and the day of payment of any preceding call, and of the insertion in the newspapers of twenty-one days' notice in respect of each of the calls, specifying the days, times, and places of payment, and of the defendant's liability to pay the amount of the calls, viz. £2250. Breach, non-payment of the calls, or any of them, or any part thereof, or any interest thereon, whereby and by virtue of the said first-mentioned act an action hath accrued, &c., [as in the first count.]

The third count stated—That whereas also the defendant, after the passing of the said first-mentioned act and before the commencement of this suit, to wit, on &c., then and at the time of making the call in this count hereafter mentioned, being a *proprietor* of divers, to wit, fifty shares in the undertaking in the said first-mentioned act mentioned, was and is indebted to the said Company in the sum of £400 for a call, to wit, a call of £8 a share upon his the defendant's said shares in this count mentioned, before then, to wit, on &c., made by the directors for the time being of the said Company, pursuant to the said first-mentioned act, and then made payable at a time before the commencement of this suit, to wit, on &c.; which said sum of £400 is still due and unpaid; whereby and by virtue of the first-mentioned act, an action hath accrued to the said Company, &c.

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The fourth count was for eight calls made upon the defendant as proprietor of shares amounting to £2250, specifying the days of making the calls.

The fifth count was for £500 for interest.

Pleas, 1st, to the third and fourth counts, *nunquam indebitatus*; 2nd, to the first and second counts, that the defendant did not subscribe to the undertaking mentioned in the said act of Parliament, *modo et formâ*; 3rd, to the first and second counts, that the said Company were not nor are making or constructing the said railway and other works in the said acts mentioned, and otherwise carrying the same into execution, *modo et formâ*; 4th, to the first count, that the said directors did not make the said calls *modo et formâ*; 5th, to the first count, that notice of the calls in the said first count mentioned was not duly given *modo et formâ*; 6th and 7th, to the second count, traversing the making of the calls and giving of the notices, as in the 4th and 5th pleas to the first count; 8th, to the first and second counts, that after the said alleged subscription by the defendant, in the introductory part of the first count mentioned, to wit, on &c.,

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the defendant sold, disposed of, assigned, and transferred all his the defendant's right, title, and interest, of and in the said fifty shares so by him subscribed for as aforesaid, and then and there and thenceforth continually hath ceased to be the proprietor thereof or interested therein, whereof the said Company had due notice.—Verification.

Similiter to all the pleas except the last, which the defendant traversed, and thereupon issue was joined. At the trial before *Rolfe, B.*, at the last Summer Assizes for the county of Durham, it appeared that the defendant had executed the subscription deed, according to the parliamentary regulations, before the passing of the first act which was obtained by the Company, for £5000, or fifty shares, in the undertaking, and had received scrip for his shares. The first act, which was obtained in 1836, empowered the Company to make a railway from the river Tees to the river Tyne, and the second act, obtained in 1837, empowered them to extend their line southward to York, and to make two branches. A small portion of the original line had been commenced, and the whole of it had been surveyed, and a sum of £100,000 paid for land. The extended line and the branches were nearly finished. The defendant had disposed of ten of the fifty shares he had subscribed for, and the amount claimed by the Company was in respect of the remaining forty. The defendant had never been *registered* as a proprietor. On the 10th of August, 1836, the directors resolved upon a call of £8 per share; but the resolution, although it mentioned the period within which the call was to be paid, did not specify any place where, or person to whom payment might be made. The following notice was afterwards inserted in the local newspapers, according to the directions of the act of Parliament:—

“Great North of England Railway.

“Notice is hereby given, that at a meeting of the directors of the Great North of England Railway Com-

pany, held this day, a call of £8 per share was ordered to be paid to the treasurer of the Company, at the Bank of Messrs. Backhouse & Co., in Darlington, on or before Monday the 5th of September next.

“(Signed, by order,) FRED. NEWMAN,
“ Clerk to the Company.”

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“ Railway Office, High Row,
Darlington, August 10, 1836.”

Several other calls were made subsequently. At the trial, it was objected for the defendant that the plaintiffs were not entitled to recover in respect of the first call, inasmuch as the resolution ordering it to be paid did not specify the place where, or the person to whom, the call was to be paid. The learned Judge however overruled the objection, and a verdict was found for the plaintiffs for £2325, which included the amount of the first call as well as of the others. No objection was made at the trial that the notice, inserted in the papers, of the first call, was not shewn to have been the act of the directors.

In the early part of this term, *Wightman* obtained a rule to shew cause why the judgment on the first and second counts should not be arrested, or why the verdict should not be set aside and a new trial had, unless the parties should agree to reduce the verdict by the amount of the first call; and also why there should not be a new trial on other grounds.

Cresswell, Addison, and S. Temple, shewed cause.—The question whether the verdict ought to be reduced depends upon this, whether the call was properly and correctly made. The execution by the defendant of the deed of subscription was duly proved, and it was also proved that notice of the call was given by an advertisement in the newspapers, as required by the act, appointing the time and place of payment, and the person to whom it was to be paid. But it is said, that the original resolution of the directors was invalid, on the ground that it did not specify any place.

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where, or person to whom, payment was to be made; and the question therefore is, whether, under the act of Parliament by which the company was formed (6 & 7 Will. 4, c. cv.) the plaintiffs were bound to prove a resolution to have been made in terms equally specific with the notice. There is no necessity for the resolution to appoint the place where the call is to be paid, or the person to whom it is to be paid; because the notice must give full information of those matters, in order to enable the parties liable to the calls to make due payment of them. Much inconvenience will be created if it be held that the notice must correspond, in all its terms, with the resolution. [*Alderson, B.*—Suppose a resolution were to specify a time and place of payment, and the notice were to appoint a different time and place?] In that case the payment must be according to the notice. The 121st section of the act requires that twenty-one days' notice of the call shall be given by advertisement in the newspapers, and the money called for is to be paid "to such persons, at such times and places, and in such manner as *in the said notice* shall be appointed." The notice of the call in question did appoint the persons, time, and place, according to that provision, and gave every necessary information to the shareholders. That was the object which the act contemplated, but it did not require that the place of payment should be named in the resolution by which the call is directed to be paid; that may form the subject of a subsequent resolution. Suppose a call were resolved upon, and ordered by the resolution to be paid at a particular bank of high reputation, and on the following day the bank were to fail, could it be said that the directors would not have power to alter the place of payment by a subsequent resolution? Again, a notice signed by a clerk to the company must be the same as if it were signed by the directors themselves; for it is provided by the 183rd section, that all notices or other documents may be signed by the clerk or treasurer of the company, and need not be under the common seal of the company. This notice, therefore, must.

be taken, in the absence of any proof to the contrary, to be a notice given by the directors. The restriction with respect to calls applies only to the amount and the time of payment, and there is no further restriction as to the form or contents of the resolution. Every subscriber, though not registered, is a *proprietor* of shares within the meaning of the act, as far as respects the liability for calls, and if that be so, then the 123rd section, which enacts, that evidence that "the call was in fact made, and that such notice was given as is directed by this act," shall be sufficient, shews that a resolution to make a call, simpliciter, is good. The objection, therefore, to the first call ought not to prevail.

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Then, as to the motion in arrest of judgment. The objection is, that the action is in debt on simple contract; and that the liability of the defendant as a subscriber being founded upon a deed, it ought to have been declared upon specially. But there is nothing in the act which requires the subscription to be by deed. By the first section of the act, all persons are incorporated who had subscribed, or should thereafter subscribe; but it does not say that the parties shall subscribe by deed, and the law does not require an engagement of this nature to be by deed. The 3rd section, empowering the company to raise £1,000,000 of money, and the 119th section, requiring subscribers to pay the amount of their subscriptions, says nothing as to the subscription being by deed. The preamble to the 195th section recites, that £660,000 only had been subscribed for at the time of the parliamentary deed, and there was consequently a large sum still to be subscribed for to raise the amount, which may have been done otherwise than by deed, as nothing is said requiring the future subscriptions to be by deed. It is matter of evidence whether the subscriptions were by deed or not, and it is consistent with what is alleged in this declaration, that the defendant may have been one of the subsequent subscribers not included in the parliamentary deed.

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The objection, therefore, ought not to prevail. Besides, the defendant being a subscriber, is also a *proprietor* of shares; and the 123rd section shews that the plaintiffs are not bound to allege that there was a deed, even although a deed may be the proper mode of proving the proprietorship. Assuming, however, that a deed is essential to constitute a valid subscription, the allegation, that the defendant "subscribed," must, after verdict, be taken to import a subscription by deed. The Company could not sue upon the parliamentary deed, because it is to be executed before the Company is in existence under the act. The deed was mere matter of inducement to the formation of the Company, and might be pleaded without a profert: *Banfill v. Leigh* (a). Perhaps this might have been a good objection on special demurrer, but it is not so after verdict. The rule, as laid down by Mr. Serjeant *Williams*, in note (1) to the case of *Stennel v. Hogg* (b), is, that "where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer; yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated, or omitted, and without which it is not to be presumed that either the Judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection, or omission, is cured by the verdict by the common law." In the present case, the fact of subscription is distinctly put in issue by the second plea, and the verdict for the plaintiff on that issue must be presumed to have been given upon proper evidence.

[They also contended that the plaintiffs were entitled to retain their verdict for the whole amount upon the 3rd and 4th counts, which charged the defendant as a "proprietor" of shares under sect. 123.]

(a) 8 T. R. 571.

(b) 1 Wms., Saund. 228.

W. H. Watson, (with whom was *Wightman*), contra.—First, with respect to the amount of the first call. According to the terms of the act of Parliament, it is clear the shareholders were entitled to the benefit of the judgment and the exercise of the discretion of the directors, who, by sect. 100, are intrusted with the general management of the affairs of the Company, for and on the behalf of the entire body of the shareholders; and they, like agents and arbitrators, have no right to delegate their authority. It is of the greatest importance that the place of payment, and the person to whom it is to be made, should be expressly selected by the directors. The instance supposed on the other side, of the failure of the bank where the calls are to be paid, shews how necessary it is that that discretion should be exercised with caution. The 119th section must be read with the 121st; and, if that is done, it will clearly appear that the place of payment is to be fixed upon at the time of making the call. By section 119 the subscribers are expressly required to pay the calls “at such times and, at such places, and to such persons, as shall be directed by the said directors.” And, upon looking to the former part of that section, it will be found that the said “directors” are the directors making the call. The notice directed to be given by the 121st section, is to be a mere copy of the resolution, and the words, “notice of every *such* call,” refer to the words of the 119th section. The notice must specify the time, place and person, and, if it omit either, it is bad. The notice is to be given by the secretary; but the authority to appoint the place of payment is confined to the directors. [*Alderson*, B.—A notice given by the secretary without the authority of the directors, would be bad altogether. The objection, that the notice was not given by the authority of the directors, was not taken at the trial.] The Company ought to have proved that they directed the terms of the notice. [*Parke*, B.—No: that must be as-

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sumed now.] Section 183 does not aid the plaintiffs, for that relates only to the service of an ordinary notice or summons, and the proviso there does not apply to a notice by advertisement. There must be a decision by the directors, appointing the time, the place, and the person, which must be come to at some meeting, and entered in a book by them. The directors can act only at their meetings.

Then, as to the 2nd point. The allegation in the first and second counts is, that the defendant "subscribed for" a certain sum; but there is nothing to shew that this was such a subscription as the act contemplated. The term *subscription* in the act has a defined meaning. The 195th section shews that the subscription was made upon a contract binding upon the heirs, and it must therefore have been by deed. [*Parke, B.*—The subscription was not necessarily antecedent to the act; and it does not appear that the subscription in question was by deed.] The declaration alleges that the defendant was a *subscriber*, which is very different from a proprietor. The 3rd section, which enables the Company to raise a million of money, refers to *shares* only, and not to *subscriptions*; and the words in the concluding part of that section, "who have subscribed or who shall severally subscribe," do not affect this distinction. A proprietor may part with his share, and yet not be a subscriber. [*Parke, B.*—I incline to think that a subscriber is under this act of Parliament a proprietor also.] The 121st section empowering the directors to make calls upon "the subscribers to and proprietors of the said undertaking," clearly recognises them as two distinct classes. In sections 86, 87, 89, 91, 93, 94, 97, 98, and 118, the terms "proprietor" and "subscriber" are used, clearly shewing that there is a distinction between them. The 86th section describes the first meeting as a meeting of the "Company," at which the names of the parties "entitled to shares" are to be entered in a book, and a

certificate is to be given to every "such proprietor," (i. e. every subscriber whose name is so entered), and in that certificate the party is designated as a "proprietor." A proprietor is therefore a person who has been *registered*; which explains the terms used in the various sections referred to, and which relate chiefly to transactions subsequent to the first meeting. [*Alderson, B.*—The 121st section speaks of calls upon "subscribers to and proprietors of the said undertaking," and enables the Company to sue any *proprietor* failing to pay his call. Does not that shew the words to be equivalent?] That section gives a right to sue proprietors only, the 119th section having already empowered the Company to sue subscribers. If the 3rd section be referred to, it will appear that a person subscribes *for* shares, and afterwards upon being registered he becomes a *proprietor of* shares. It is therefore submitted, that every unregistered subscriber is not a proprietor within the meaning of the act.

But then it is assumed that the fact of making a call, to which the 123rd section refers, implies a simple resolution of the directors, ordering the payment of certain sums of money by the shareholders, without specification of time, place, or person. That, however, is begging the question, which is, whether that specification be necessary or not. Next, the preamble to the 195th section shews that the original subscribers had executed a deed, and it was to be inferred that other subscribers who afterwards came in would do so also. If the defendant is to be presumed to be, not an original but a future subscriber, it must be presumed that he became so by having executed a deed. And therefore the first and second counts ought to have alleged a deed, as it was the foundation of the defendant's liability. The 123rd section is inapplicable to the case of a subscriber not registered, as has been already shewn, and the argument drawn from it therefore fails altogether. The deed is the gist of the action,

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Exch. of Pleas, and not mere inducement. If it were executed after the passing of the act, the Company would be a party to it; if executed before the act was passed, the Company, though not party or privy in the ordinary sense, are made statutory assignees by section 119, inasmuch as they take the benefit of the deed, and may enforce payment of the subscriptions.

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But it is said, that, if a deed be necessary, the omission to set it out is cured by verdict; but that is not so. The first and second counts allege that the defendant was a subscriber for such a sum of money, and entitled to the shares in the undertaking, but not that he subscribed with reference to the act of Parliament, or in the sense in which that word is used in it. This is therefore the statement of a defective title, and not a good title defectively or imperfectly stated. It was not requisite to prove the existence of a deed, in order to support the verdict on the issue as to the subscription, which might be proved, consistently with the first and second counts, by a contract in writing not under seal, or even by a parol contract. The examples given by Mr. Serjeant *Williams* in note (1) to *Stennel v. Hogg* (a), as illustrations of the rule there laid down, are distinguishable from the present. In the action for rent by the bargainee of a reversion, the omission to allege the attornment of the tenant, (before the statute 4 Anne, c. 16, s. 9), was cured by the verdict for the plaintiff upon the issue on *nil debet*; because the verdict must be presumed to have proceeded upon evidence of an attornment, which at that time was a necessary ceremony to complete the title of the bargainee: *Hitchins v. Stevens* (b). So in the cases there mentioned, of pleading the grant of a reversion, a rent-charge, an advowson, or any other hereditament which lies in grant, and can only be conveyed by deed. On the other hand, in *Rushton v.*

(a) 1 Wms. Saund. 228.

(b) 2 Show. 233.

Aspinall, it was held, in an action against the indorser of a bill, that the want of an allegation of a demand upon and refusal by the acceptor at the time when the bill became due, or of notice to the defendant of the acceptor's refusal, was error, and not cured by verdict; because proof of these circumstances was not required to support any allegation in the declaration. In *Jackson v. Pesked*, which was an action on the case by a reversioner, the judgment was arrested after verdict for the plaintiff; because as the plaintiff had not alleged that his reversionary interest was prejudiced, or stated any injury of such a nature as to be necessarily injurious to his reversion, no evidence was required on these points, and therefore none could be presumed to have been given. The case of *Rawson v. Johnson (a)* went upon the ground, that a readiness and willingness to receive and pay for a quantity of malt, according to the terms of sale by which the defendant had undertaken to deliver on request, and which he had refused so to deliver, was sufficient without any allegation of a tender of the price. In this case the allegation that the defendant was a subscriber did not necessarily imply the existence of any deed.

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PARKER, B.—I am of opinion that this rule must be discharged. The first point, as to the reduction of the verdict by the amount of the first call, depends upon the question, whether that call was correctly made; and the objection is, that the resolution of the directors making the call, although it makes it payable within a limited time, does not state the place at which, or person to whom, it is to be paid. The advertisement, however, which is published in the newspapers, does state both the place where, and the person to whom, the money is to be paid, and in other respects follows the requisitions of the 121st

(a) 1 East, 203.

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section. As the objection, that there was no distinct proof of the publication of the notice being the act of the directors, was not taken at the trial, we must assume it to have been their act; and the question then is, whether, in addition to the specification of the place of payment in the notice, it is necessary that the place should be specified also in the resolution for the call. By the 121st section, the directors are empowered to make such calls for money, &c. as they from time to time shall find necessary; and it is enacted, that the aggregate amount of calls shall not exceed £100, and that no call shall exceed the sum of £10 upon each share; and an interval of three calendar months is to elapse between the days of payment of each call. Now there is not one word in this enactment requiring that the place of payment, or person to whom payment is to be made, shall be named at the making of the call. That section then proceeds to provide, that twenty-one days' notice shall be given of every call, by advertisement in certain newspapers therein mentioned, and enacts that all money so called for shall be paid to such persons, and at such times and places, as in the said notice shall be appointed. The *notice*, therefore, must contain those requisites. In this instance the notice does state the time and place of payment, and in other respects complies with the act of Parliament. Assuming the resolution, therefore, to be the act of the directors, I think that the call in question was properly made.

Then, with respect to the motion in arrest of judgment, the question is, whether it is necessary to state in the declaration that the subscription was by deed. It has been suggested that there is a distinction between *proprietors* of shares and *subscribers*; upon that part of the case, however, we give no opinion. The first and second counts allege a liability in the defendant as a subscriber; and it is contended, that it ought to have been alleged in those counts that his subscription was by deed. I think the answer given to that

argument on the part of the plaintiffs is a satisfactory one. It does not follow that the parliamentary deed should contain the names of all the persons who subscribed; for the subscription is not confined to the parties named in the deed. But assuming that the defendant was of necessity a party to it, it is evident that the Company need not, and indeed could not, be made a party to such deed; because it is required to be executed before the existence of, and as preliminary to, the formation of the Company. That is a conclusive reason why the Company ought not to sue upon the deed. If, however, the action is to be considered as founded upon the deed, so as to make the statement of it in strictness necessary, then the case falls within the rule laid down in *Stennel v. Hogg*. It is there said, that "where a grant of a reversion, or any other hereditament which lies in grant, and can only be conveyed by deed, be pleaded, but is not alleged to have been by deed, yet if the grant be put in issue, and found by the jury, the verdict cures such imperfection by the common law." The defendant is alleged to have become a subscriber, and if, in order to prove that fact, the production of the deed was requisite, it must be assumed, after verdict, that such proof was given. I think the declaration is good, at all events after verdict, and probably before.

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ALDERSON, B., GURNEY, B., and ROLFE, B., concurred.

Rule discharged.

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section. As the objection, that there was no distinct proof of the publication of the notice being the act of the directors, was not taken at the trial, we must assume it to have been their act; and the question then is, whether, in addition to the specification of the place of payment in the notice, it is necessary that the place should be specified also in the resolution for the call. By the 121st section, the directors are empowered to make such calls for money, &c. as they from time to time shall find necessary; and it is enacted, that the aggregate amount of calls shall not exceed £100, and that no call shall exceed the sum of £10 upon each share; and an interval of three calendar months is to elapse between the days of payment of each call. Now there is not one word in this enactment requiring that the place of payment, or person to whom payment is to be made, shall be named at the making of the call. That section then proceeds to provide, that twenty-one days' notice shall be given of every call, by advertisement in certain newspapers therein mentioned, and enacts that all money so called for shall be paid to such persons, and at such times and places, as in the said notice shall be appointed. The *notice*, therefore, must contain those requisites. In this instance the notice does state the time and place of payment, and in other respects complies with the act of Parliament. Assuming the resolution, therefore, to be the act of the directors, I think that the call in question was properly made.

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ALDERSON, B., GURNEY, B., and ROLFE, B., concurred.

Rule discharged.

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WALLACE and Two Others *v.* KELSALL.

To an action by three plaintiffs for a joint demand, the defendant pleaded an accord and satisfaction with one of the plaintiffs, by a part payment in cash and a set-off of a debt due from that one to the defendant:—*Held*, that the plea was good, without alleging any authority from the other two plaintiffs to make the settlement.

DEBT demanding £264, that is to say, £88 for goods sold and delivered, £88 for work and materials, and £88 for money due on an account stated.

Pleas.—1st, except as to £88, parcel &c., *nunquam indebitatus*. 2nd, as to the said sum of £88, parcel as aforesaid, the defendant says, that the plaintiffs ought not further to maintain their aforesaid action thereof against him; because he says, that, before and at the time of the satisfaction and discharge hereinafter mentioned, the plaintiff Andrew Wallace was indebted to the defendant in the sum of £75, and that before and at the time of the satisfaction and discharge hereinafter mentioned the defendant was indebted to the plaintiffs in the sum of £88, parcel as aforesaid, and to the said plaintiff Andrew Wallace in the sum of £44; for the recovery of which said sum of £44, amongst other things, the said plaintiff Andrew Wallace, before the said discharge and satisfaction, to wit, on the 1st day of March, 1840, commenced an action of debt in the Court of our Lady the Queen, before the Barons of her Exchequer at Westminster, which said action before and at the time of the said discharge and satisfaction was still pending. And the defendant further says, that he the defendant, so being indebted in the said sum of £88 and £44, amounting together to the sum of £132, and the said plaintiff Andrew Wallace being so indebted in the said sum of £75, he, the defendant, after the commencement of this suit, to wit, on the 31st day of March, 1840, set-off and allowed to the plaintiff Andrew Wallace the said sum of £75 so due to the defendant, against the sum of £75, parcel of the said sum of £132, and then paid to the said Andrew Wallace

the sum of £57, and then delivered to the said Andrew Wallace a piece of flannel of great value, to wit, of the value of 2*l.* 6*d.* in full satisfaction and discharge of the said debts of £88 and £44, and of all damages by the plaintiffs, and by the said plaintiff Andrew Wallace, sustained, either jointly or solely, by reason of the detention of the said sums of £88 and £44 respectively, and of the costs and charges of the plaintiffs by them in and about their suit in this action, so far as the same relate to the said sum of £88, parcel as aforesaid, in that behalf expended, and of the costs and charges of the said plaintiff Andrew Wallace by him about his suit in the said other action, so far as the same relates to the said sum of £44 in that behalf expended, and in full satisfaction and discharge of the said debt of £75 so due to the defendant, and of all damages by the defendant sustained by reason of the non-payment thereof; which said set-off and allowance, payment, and delivery of the said piece of flannel, the said plaintiff Andrew Wallace then agreed to, accepted, and received in full satisfaction and discharge of all the said debts, damages, and costs, in satisfaction and discharge whereof they were so made by the defendant as aforesaid.—Verification.

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Special demurrer to the second plea, on the ground that it did not state any agreement between the other plaintiffs and Wallace that the set-off should be allowed, or any authority to him to receive the debt due to the three, or in any way to settle it; and that the accord and satisfaction alleged was insufficient, inasmuch as the set-off of mutual, private, and separate debts between the defendant and Wallace could be no satisfaction of any part of the debt due to the plaintiffs jointly, without their request or concurrence.—The defendant's points, as marked for argument, were, that one of several joint creditors acting *bonâ fide*, which is to be presumed, may discharge the debtor; that no actual authority from the others is

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required; that if it were, the want of it should be alleged by the plaintiffs, as it is a matter within their knowledge rather than the defendant's; and that if one of several plaintiffs is satisfied, the others cannot recover, because they cannot do so without joining the one, and he is barred.

Hoggins, in support of the demurrer.—The plea is bad. On the face of this plea, it does not appear that there was any consent given by the other two plaintiffs that Wallace should allow this set-off in reduction of the debt which was due to the three jointly; nor does it shew that he had any authority, express or implied, to do so. In cases of partnership, one partner may receive payment of a debt due to the firm, and may give a receipt for it: *Henderson v. Wild* (a). But in those cases there is an implied authority in one partner to receive payment of and release the partnership debts, and to deal generally with the partnership property. But here there was no partnership between the plaintiffs, and the plea does not allege that it was with the authority or knowledge of the other two that Wallace accepted the money and goods in satisfaction and discharge. It is clear that one of several joint creditors cannot release a debt due to all, except with the consent of the others. This was done by Wallace in fraud of his two co-creditors, and the question is, whether, he having, in fraud of his two co-creditors, set-off his own private debt against a debt due to the three, that can be pleaded as an answer to an action by the three for the recovery of the debt. It is submitted that it clearly cannot. Besides, the accord and satisfaction alleged in the plea is stated to have been after the action brought, and there can be no set-off after the commencement of the action. Com. Dig. Accord (B. 4); *Evans v. Prosser* (b). [*Parke*, B.—That is where the plea is in bar

(a) 2 Camp. 561.

(b) 3 T. R. 186.

of the action generally; but this is a plea to the *further* *Exch. of Pleas,*
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maintenance of the action.]

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Cowling, in support of the plea.—It is admitted that this is not a case of partnership in the ordinary sense of the word; but any one of several joint creditors, whether in strictness a partnership exists or not, may give a receipt to a joint debtor, which will bind them all. If three persons sue as plaintiffs, a release by one will bar the others. In the case where a release is given, the probability is that there is no consideration given at all; but this is not a mere release, for the plea states that Wallace received value for it. Where several persons are joined together in suing, all are bound by the act of one. In *Ruddock's case* (a) it is laid down, that "When in the writ of error the plaintiffs shall recover any personal thing, as if they were barred in an action of debt, trespass, &c. for there the release of one shall not bar the other, but (only) when the ground of the action is a joint interest which may be released." And that "When two are to recover a personal thing, there the default of the one is the default of both; but when they are to discharge themselves of a personalty, there the default of one is not the default of both." A release by one operates by way of estoppel, and may be without consideration; but here there was a full and valuable consideration, viz. a set-off of an equal sum of money; it is the same as if the defendant had paid so much money in cash to Wallace; and the satisfaction was therefore complete. The general principle laid down in the cases is, that a satisfaction to one of several plaintiffs in a personal action is a satisfaction to all. In *Richmond v. Heapy* (b), where one of three partners undertook to provide for two bills drawn by the three partners, and accepted by a fourth person, it was held that such acceptances

(a) 6 Rep. 25 a, b.

(b) 1 Stark. N. P. C. 202.

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would not support a commission on the petition of the three partners against the acceptor, although the conduct of the one partner might as against his co-partners have been fraudulent. Lord *Ellenborough* there said, "Assuming fraud, and that Spear was the most fraudulent man alive; yet since you must recover through him, if he has so behaved that he cannot recover as one of the three, he cannot be a petitioning creditor." In *Sparrow v. Chisman* (a), where one of several partners in a banking-house drew a bill in his own name upon a third party, who accepted the same, upon condition that the drawer should provide for it when due; it was held that no action on the bill lay against the acceptor, either by the drawer alone or by his firm jointly. There *Bayley, J.*, says, "A party to whom an acceptance is given upon a condition that he will provide for it when due, and who does not perform that condition, cannot sue the acceptor; and if Peckover, (the partner who drew the bill), could not have sued alone, how can he sue jointly with others? His partners, being bound by his acts, cannot recover through him." *Jones v. Yates* (b) is also an authority to shew, that where one partner has rendered himself incapable of suing for partnership assets, the firm cannot maintain an action to recover those assets, even although the transaction out of which his disability arose was a fraud upon his co-partners. In that case, Sykes being in partnership with Yates and Young, and also in a separate partnership with Bury, indorsed three bills, (the property of Sykes & Bury), to Sykes, Yates, & Young, in discharge of Sykes's private debt to the latter firm, and immediately indorsed the bills to a creditor of theirs. Sykes and Bury became bankrupts; and it was held that their assignees could not maintain trover for the bills, nor

(a) 9 B. & C. 241; 4 M. & R.
206.

(b) 9 B. & C. 532; 4 M. & R.
613.

assumpsit for money paid, against Yates & Young. Lord *Tenterden*, in delivering the judgment of the Court, says, "We are not aware of any instance in which a person has been allowed, as plaintiff in a Court of law, to rescind his own act, on the ground that such act was a fraud on some other person; whether the party seeking to do so was suing in his own name only, or jointly with such other person. It was well observed on behalf of the defendants, that where one of two persons who have a joint right of action, dies, the right then vests in the survivor, so that in this case, (if it be held that Sykes & Bury may sue), if Bury had died before Sykes, Sykes might have sued alone, and thus for his own benefit have avoided his own act by alleging his own misconduct." Every remark there made applies to this case. If this plea be held not to be a good answer to the action, it would follow that if Wallace were to survive his co-plaintiffs, he might, in fraud of his own agreement, sue the defendant for the very same debt for which he had himself received full satisfaction. It is therefore no answer to this plea to say that this accord and satisfaction was fraudulent as to Wallace's co-creditors; but even if it were, if the plaintiffs intended to rely upon the fact of fraud, they ought to have replied it: even, however, assuming the existence of fraud, the cases of *Jones v. Yates* and *Richmond v. Heapy* are an answer to that objection. [*Parke, B.*—Are there not cases which seem at variance with the principle laid down in *Jones v. Yates*, as far at least as relates to the question of fraud?] In *Longman v. Pole (a)*, Lord *Tenterden* held that if a person colludes with one partner in a firm to injure the other partners, those others can maintain a joint action on the case against the person so colluding. It is submitted, however, that that case cannot be supported. [*Rolfe, B.*—That would go to shew that the other

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(a) Moo. & Mal. 223.

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two plaintiffs, without Wallace, might have brought an action against Kelsall for the injury done to them.] In *Bristow v. Eastman* (a), it was held at nisi prius that one of the assignees of a bankrupt estate could not give a valid receipt for money due to the estate, where the express dissent of the other appeared. That decision, however, does not apply to this case: it did not proceed on the ground that one plaintiff could not bind another, by giving a discharge or a release. *Fitch v. Sutton* (b) is no authority against the defendant. And in *Smith v. Jameson* (c), Lord *Kenyon* entertained an opinion directly opposed to that expressed in *Bristow v. Eastman*, and held, that where there are several assignees of a bankrupt's estate, one of them may receive money belonging to the estate, and give a good discharge for it. Besides, there is a great difference between the case of assignees and that of partners or co-creditors, for the assignee of a bankrupt is like a trustee: upon which ground it was held by Lord *Hardwicke*, in *Cann v. Reid* (d), that one assignee could not give a valid receipt, and that the co-assignees must join. In *Skaipe v. Jackson* (e), receipts signed by one of two co-trustees, and in *Farrar v. Hutchinson* (g), a receipt given by one partner in the name of the firm, but without the knowledge of the other partners, were held not to be conclusive. But those cases are not opposed to the principle laid down in *Jones v. Yates*, but were decided on the ground that evidence was properly admissible to shew fraud, notwithstanding the receipt; and the principle, that that which operates as a bar to one plaintiff is a bar to the other co-plaintiffs, is not affected by those decisions. Where there are several joint creditors, a party has a good defence if he has paid any one of them. In *Bayley on Bills*, 5th edit., 347, it is

(a) 1 Esp. 172; Peake, 223.

(b) 5 East, 230.

(c) 1 Esp. 114.

(d) 3 Atkins, 695.

(e) 3 B. & Cr. 421.

(g) 1 P. & D. 437; 9 Ad. & El. 641.

said—"Satisfaction of a bill or note, as to one of several partners, is a satisfaction as to all; and if a person be a partner in two firms, satisfaction as to one firm is so as to both; what would bar one firm would bar the other." That is not confined to partnerships, but extended to the case of a party being a member of two firms, which would be like the case of two co-creditors. Suppose the other parties were to die, and Wallace were to sue alone, surely he would be barred; then why should he not in the present case? In *Fitzh. N. B. 138*, note (a), by Lord *Hale*, it is said, "In detinue of charters by two, if the defendant delivers them to one of them, he shall be excused against the other." If that be a good defence as to a chattel, why should it not be so as to a debt? With respect to fraud, none is here alleged, and it cannot be implied.

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Hoggins, in reply.—No case has been cited to shew that where one co-creditor, after action brought, goes to the debtor and receives the debt, and gives him a discharge, it is a good answer to the action. But even if it were, it has not been so pleaded in this case. If the effect of that which took place between Wallace and the defendant was to discharge the defendant as against all the plaintiffs, the plea ought to have alleged that, and not to have alleged that Wallace only accepted in satisfaction and discharge. In *Kinnerley v. Hossack* (a), where an agreement to set off a specific joint debt against specific separate debts was pleaded, it was alleged that *all* the parties had agreed. The plea should either have shewn that Wallace had authority to make the settlement, or should have stated that all the three had agreed. It should have been pleaded as satisfaction to all. [Lord *Abinger*, C. B.—If payment to one is payment to all, it is the same as if pleaded as payment to all.] The

(a) 2 Taunt. 170.

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defendant should have said that payment to one was payment to all. [*Parke, B.*—Have you any authority for that position, that payment to one may be pleaded as payment to all?] The ordinary rule of pleading is to set out the legal effect of a transaction, which here was, as it is said, payment to all. The case of a release is an exception, because otherwise there would be a variance between the allegation and the deed. Almost all the cases which have been cited occurred before the new rules came into operation, when a defence of this kind need not have been specially pleaded. They are, therefore, not in point as to the form of the plea.

Lord ABINGER, C. B.—I am of opinion that this plea is good; and that, as it is competent for one of three joint plaintiffs to release a joint debt, it is competent to one of three joint plaintiffs to settle the action, so as to protect himself from being obliged to sue. The case that might be suggested has been properly put in argument. Suppose, after this accord and satisfaction, two of the plaintiffs were to die, and the only person surviving were the person who gave the accord and satisfaction, it is quite plain, in that case, that he could not have sued for this debt. If it is not illegal, the accord and satisfaction operates as a release by him; and if it is a release by him, that is sufficient. This is an accord and satisfaction by one, and no fraud is suggested, nor can it be presumed: we have just as much right to presume that the other parties authorized him to settle the action, as that the settlement was fraudulent. If any question of fraud were to arise, so as to do away with this transaction, it ought to be put upon the record, so that we might see the effect of it. Upon this case as it stands, it appears to me to be a clear case of accord and satisfaction; it is a payment of the debt by this defendant to that one party, who has agreed to accept it, and no longer to go on with the action.

PARKE, B.—I entirely concur in opinion with my Lord Chief Baron, that this is a good plea. It is pleaded in bar to the further maintenance of this action, and if it is a good accord and satisfaction, it may be so pleaded. The question is, whether it is a good accord and satisfaction. There was another action for a separate demand. There was a sum of money due from the defendant to one of the plaintiffs, and there was a sum of money due from that plaintiff to the defendant. A settlement of accounts took place: the one plaintiff to whom a certain debt was due agreed that the one debt should be set off against the other, and so the balance was paid. If that transaction be free from fraud, (and I do not see that the record imputes fraud to any one), it is distinctly agreed that there should be accord and satisfaction between the plaintiffs jointly and the defendant. In the case referred to, of *Jones v. Yates*, the principle of the decision is, that if one of the plaintiffs is barred, he cannot recover by joining other plaintiffs in an action to undo his own act. In this case, no doubt, the plaintiff Wallace, who has made this agreement, is barred by his own agreement to set off one debt against the other; and he cannot undo the transaction by joining the other two plaintiffs with him for that purpose. I am of opinion, therefore, that this is a good plea, supposing there was no fraud, and there is no imputation of any. We cannot assume that there was any fraud, unless it be alleged in the pleadings: and when the question arises whether the fact of fraud would make any difference, I apprehend the same answer may be given as was used in the case of *Jones v. Yates*, that a person cannot be allowed, as a plaintiff in a court of law, to rescind his own act by joining his co-partners with him. The case of *Skaife v. Jackson* and *Farrar v. Hutchinson* steer clear of that point, and are plainly distinguishable; they were decided on the ground that a receipt given for money is not conclusive, and that a plaintiff may, notwithstanding, shew that the

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money has not in fact been paid. It is unnecessary for us to give an opinion on the case of fraud, because that is not presumed; and this case is decided simply on the ground, that one of the parties has received satisfaction for a joint demand due to himself and others, which puts an end to such joint demand, and that he cannot afterwards, by joining the other parties with him as plaintiffs, recover that debt.

GURNEY, B., concurred.

ROLFE, B.—I am of the same opinion. Were we to decide otherwise, it is plain it might lead to this absurdity, that supposing the plaintiff Wallace to have received a full discharge of the debt; yet he might, if he survived the other parties, recover the whole of it over again.

Judgment for the defendant.



BODENHAM and Others v. HILL.

A plea merely in the negative need not conclude with a verification.

To an action of assumpsit for work and labour as an attorney, the defendant pleaded non assumpsit infra sex annos, and concluded with a prayer of judgment, omitting the verification:—*Held*, on special demurrer, that the plea was good.

ASSUMPSIT for work and labour as attornies, with a count on an account stated.

Plea, that the defendant did not within six years next before the commencement of this suit promise in manner and form as the plaintiffs have above alleged, wherefore she prays judgment if the plaintiffs ought to have their aforesaid action against her.

Special demurrer, assigning for causes, that the plea, though purporting to contain matters in bar of the damages and rights of action in the declaration mentioned,

does not conclude either with a verification or to the country; that though pleaded to the whole declaration, it nevertheless concludes with a prayer of judgment; and that it is wrong in form, inasmuch as it states that the defendant *did not promise* within six years &c., whereas it ought to have stated that the *cause of action did not accrue* within six years.

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The defendant's points marked for argument were, that negative pleas, which contain no affirmative allegations, do not require to be verified, and according to the rules of good pleading ought not to conclude with a verification; that pleas which do not conclude to the country, must at common law conclude to the Court, by praying judgment from the Court; and that the new rules of pleading, H. T. 4 Will. 4, provide "that it shall not be necessary to use any prayer of judgment," but those rules have not forbidden the use of such a prayer, the introduction of which appears to be necessary, or at least convenient, when a plea being in the negative, its termination is not denoted by a verification; that when the cause of action is complete at the time of the promise, as in cases like the present, of *indebitatus assumpsit*, the defendant may plead *non assumpsit infra sex annos*, or *actio non accrevit infra sex annos*, at his election.

Whateley appeared to argue in support of the demurrer; but was stopped by the Court, who called upon

Manning, Serjt., to support the plea.—This being a plea merely in the negative, and containing no averment of any affirmative matter, need not, and, according to the rules of good pleading, ought not, to be verified. There are many authorities in the old books to that effect. [*Parke*, B.—A plea of the statute of limitations is not simply a negative plea; it is in *confession* and avoidance.] All that is new is a negative proposition; and it cannot be necessary to offer to prove that upon which both parties are *agreed*. In

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Co. Litt. 303. a, it is said—"Counts or such as be in nature of counts (as an avowry, wherein the defendant is an actor,) need not to be averred, but all other pleas in the affirmative ought to be averred, et hoc paratus est verificare, &c., but pleas merely in the negative ought not to be averred, because a negative cannot be proved." The same position is to be found in Mr. Serjeant *Eure's* *Doctrina Placitandi*, 50, which is a work of the highest authority (a), and the same reason for the distinction is there stated as given by Lord Coke: "Pleas in the negative need not be averred, *nor ought* (nec doient) to be averred; *because a negative cannot be proved.*" This distinction is recognised in *Millner v. Crowdall* (b), which is directly in point. That was an "action on the case for fees, &c., and indebitatus for fees and labour in al' negot. The defendant pleaded the stat. 1 Jac. 1, c. 7, s. 1, that no bill was delivered under the plaintiff's hand. Demurrer, because he had not averred his plea. But the Court said, It is needless, if a negative plea." The same point was decided in *Obin v. Knott* (c), where it was held that "nul tiel record, being in the negative, need not be averred." The same distinction is alluded to in the notes to *Thursby v. Plant* (d). This was the old law, and any modern practice of concluding these pleas with a verification is incorrect and altogether useless. In the forms in common use, the plea certainly concludes with an averment. But this is easily accounted for. It takes less time to insert half a dozen words, than to consider whether they may be safely omitted; a principle which has been largely acted upon in drawing conveyances and acts of Parliament, as well as pleadings. It is laid down by Lord Coke (e), and by Mr. Serjt. *Eure* (f), that an avowry, being in the nature of a

(a) "Nota: *Willes*, C. J., said, There is more law and learning in *Doctrina Placitandi*, than in any other book he knew," 2 *Wils.* 88.

(b) 1 *Show.* 338.

(c) *Fortesc.* 339.

(d) 1 *Wms. Saund.* 235.

(e) *Suprà.*

(f) *Ib.*

count, need not be averred, and this was distinctly so held in *Brett v. Rigden* (a); yet it is probable that not a single pleader in Court, either on the bench or at the bar, has ever met with an avowry or a cognizance which had not this useless and informal addition. *Brett's case* is cited by Lord Coke, who also refers to 27 Hen. 8, f. 27, which appears to be a misprint, 27 Hen. 6, and 9 Hen. 7, are also cited, without giving any page. These are probably references to some records which Lord Coke had seen, as no case has been found in either of those years to which the references can apply. In *Knowles v. Stevens* (b), it is stated in the marginal note, that since the rules of H. T. 4 Will. 4, a plea must conclude with a verification or to the country. But in that case there was no prayer of judgment, and all that the Court said was, that there ought to have been a conclusion to the plea. It might perhaps have been contended, that since the rules of H. T. 4 Will. 4, a prayer of judgment was not necessary; but the attention of the Court was principally drawn to the substance of the plea, and the plea being held to be defective in substance, the formal objection became immaterial, and appears not to have been much considered.

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A conclusion to the country would have been clearly bad; and the only proper way of concluding is, to pray the judgment of the Court; which is unobjectionable; for there is nothing in the rule of H. T. 4 Will. 4, reg. 9, to prohibit the use of it when convenient. [*Parke, B.*—The introduction of a prayer of judgment where it is unnecessary, is no ground of demurrer. The only consequence is that the unnecessary words will be disallowed on taxing the costs.]

As to the form of the plea, where the debt is due at the time of the promise alleged, non assumpsit infra sex annos is clearly a good plea: 2 Wms. Saunders, 63 b.

The defendant is therefore entitled to judgment.

(a) Flowl. 342.

(b) 1 C., M., & R. 26.

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Whateley, contra.—It has been the constant practice among pleaders for many years to conclude pleas of this nature with a verification, and the old law must be considered as altered in this respect. Every plea must contain a conclusion either to the Court or to the country. In *Knowles v. Stevens* (a), it was so held. The case of *Millner v. Crowdall* was there cited, and must be considered as having been overruled. [*Parke*, B.—In the case of *Knowles v. Stevens*, the plea had no conclusion at all, and the Court held that a plea without any conclusion was bad; but this point was not raised at all.] In *Chitty on Pleading* (b), it is said—“It is an established rule in pleading, that whenever new matter is introduced on either side, the pleading must conclude with a verification or averment:” for which the author cites 1 Wms. Saund. 103, a, 3, and n.; Com. Dig. Pleader (E. 33). This is new matter, because it may be answered in several ways. [*Parke*, B.—The defendant does not take away from you any opportunity of replying by this form of pleading.] In *Jones v. Pope* (c), and *Duppa v. Mayo* (d), a plea of the Statute of Limitations was concluded with a verification; and in *Cowper v. Towers* (e) the same conclusion was adopted. It may be doubted whether this is a plea in the negative.

Lord ABINGER, C. B.—It seems to me that it is not necessary to add a verification to a plea like the present. I am not aware that the *hoc paratus est verificare* is of any value, and it is desirable to get rid of useless forms. Besides which, my Brother *Manning* has shewn, by referring to the ancient authorities, that it is unnecessary to insert it. The general practice among pleaders in modern days has undoubtedly been in conformity with what Mr. *Whateley* has said; but it appears to have been unnecessary.

(a) 1 C., M., & R. 26.

(b) Vol. 1, p. 557.

(c) 1 Wms. Saund. 37.

(d) 1 Wms. Saund. 280.

(e) 1 Lutw. 98.

PARKE, B.—The general practice has undoubtedly been to conclude these pleas with a verification. I always adopted that conclusion myself, and the point now raised is quite new to me. However, my Brother *Manning* has satisfied me that it is quite unnecessary to add the verification, and I think the good sense of the matter is, that a party should not be required to verify that which it does not lie upon him to prove. In the case of *Knowles v. Stevens*, this point was not raised.

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Leave to amend on payment of costs, otherwise

Judgment for the defendant.

WEBB, Treasurer to the Commissioners for building a new Gaol, &c., for the Borough of Carmarthen, v. JAMES and Others.

DEBT on bond.—The defendants cravedoyer of the bond, which was set out, and was as follows:—"Know all

Debt on bond
by the treasurer
appointed by
Commissioners
acting under a

local Lighting and Paving Act, against a collector of rates and his sureties. The defendants cravedoyer of the bond and condition, which recited, inter alia, that H. J., one of the defendants, had been appointed collector of the rates due and payable under and by virtue of the act, and had been called upon to give security for the due performance of the office; and the condition was, inter alia, for the collection of all such rates as H. J. should be directed to demand and obtain by virtue of his said office, and for delivering a true account of and paying to the treasurer of the Commissioners, all monies by him received "by virtue and for the purposes of the said act." The defendants then pleaded, so far as related to that part of the condition, that "during the continuance of the said appointment no rate was made or in any way existed which he, the said H. J., could legally or according to law collect or get in, or could legally or according to law demand or obtain by virtue of his said office, and that he did not at any time during the continuance of his said appointment, legally receive any money by virtue or for the purposes of the said act or relative to the collectorship of the said rates:"—

Held, 1st., that the plea would have been bad on special demurrer, if the objection had been sufficiently pointed out, for attempting to raise an issue of law, and for not shewing positively, either that no rate was made, or in what the alleged illegality consisted.

2ndly, that the first part of the plea, which stated "that no rate was made, or in any way existed which he, the said H. J., could legally or according to law collect or get in," &c., not being specially demurred to, was a substantial defence to the action, as shewing a sufficient excuse for non performance of the condition; and that the rest of the plea might be rejected as surplusage.

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men by these presents, that we Henry James, of the county of the borough of Carmarthen, victualler, William Morgan, of the same place, currier, and John Lewis, of the same place, timber merchant, are jointly and severally held and firmly bound to Thomas Taylor Webb, of &c., Treasurer appointed by the Commissioners acting under and by virtue of an act made and passed in the 32nd year of the reign of his late Majesty King George the 3rd, intituled, &c., in the penal sum of £250, of &c., to be paid to the said Thomas Taylor Webb, as such treasurer as aforesaid, and his successors for the time being, for which payment to be well and faithfully made, we bind ourselves jointly, and each of us bindeth himself severally, and our and each of our heirs, executors, and administrators, firmly, by these presents, sealed, &c. The defendants also craved oyer of the condition of the bond, which was as follows:—"Whereas, in and by the above-mentioned act, it was amongst other things enacted, that the Commissioners therein mentioned, or any five or more of them, should and might from time to time nominate, constitute, and appoint one or more treasurer or treasurers, clerk or clerks, surveyor or surveyors, and such collector of the rates thereafter mentioned, and such other officers as they should find necessary for the execution of the said act, and might from time to time remove and displace all or any of them, and nominate and appoint such other person or persons in the room of him or them who should be so removed, and that the said Commissioners should and might, and they were thereby authorised and required to take such security from time to time, for the due execution of the said offices respectively, as the said Commissioners should think proper: And whereas the said Henry James hath been duly elected and appointed collector of the rates due and payable under and by virtue of the said act, and hath been called upon to give security for the due performance of

the said office of collector of the rates: now the condition of the above written obligation is such, that if the above bounden Henry James shall from time to time and at all times during the continuance of the said appointment, or of any future appointment or appointments of him as collector as aforesaid, well and faithfully collect and get in all such rates as he may be directed to demand and obtain, by virtue of his said office, and do and shall deliver to the said treasurer all books and papers, and a true and perfect account in writing of all matters and things committed to his charge by virtue of the hereinbefore recited act, and also of all monies which shall have been by him received, by virtue and for the purposes of the said act, and shall and do pay all such monies as shall have been received by him to the said Thomas Taylor Webb, or his successors, as treasurer for the time being, acting by virtue of the said act, relative to the collectorship of the said rates; then this obligation to be void, or otherwise to be and remain in full force and effect." The defendants then pleaded:

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First, non est factum.

Secondly, that there was not any other or future appointment of him the said Henry James as collector as aforesaid, except the appointment in the condition mentioned; and that during that appointment, he performed the condition of the bond. Verification.

Thirdly, the defendants say that there was not any other or future appointment of him the said Henry James as collector as aforesaid, except the said appointment in the said condition mentioned; and that during the continuance of the said appointment, no rate was made or in any way existed, which he the said Henry James could legally, or according to law, collect or get in, or could legally, or according to law, demand or obtain by virtue of his said office; and that he did not at any time during the continuance of his said appointment legally receive any

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money by virtue or for the purposes of the said act, or relative to the collectorship of the said rates; and that he did from time to time, during the continuance of the said appointment, deliver to the said treasurer all books and papers, and a true and perfect account in writing, of all matters and things committed to his charge by virtue of the act recited in the said condition. Verification.

Special demurrer, assigning for causes, that the said last plea neither avers performance of the condition of the said writing obligatory, nor excuses the non-performance. That it does not contain any matter of excuse for the said Henry James not delivering an account of all monies by him received by virtue or for the purposes of the said act; or for the non-payment of all such monies as were by him received relative to the collectorship of the said rates. That the said last plea does not deny that the said Henry James received such monies, but avers that he did not receive the same legally; and that the defendants cannot be allowed to allege the illegality of the act of the said Henry James, in excuse for his non-performance of the said condition. That the said defendant, Henry James, cannot be allowed to set up or take advantage of his own wrong or illegal acts. And also for that the said last plea admits that the said Henry James did receive monies by virtue and for the purposes of the said act and relative to the said collectorship, but denies that the same were received legally by him. And also for that so much of the said last plea as relates to the said monies, is a negative pregnant, admitting the receipt of such monies; and it is uncertain and ambiguous whether by the said plea it is intended to deny the receipt of such monies, or to admit such receipt, and to allege the illegality thereof. That the plaintiff cannot take any certain issue on the said plea, or any matter of fact therein, but must take issue on the legality or illegality of the receipt by the said Henry James of the said monies. And for that, if the defendants had

intended to rely on any illegality in the receipt of the said money, such illegality ought to have been specially stated, and the facts constituting such illegality averred in the said plea; and it ought to have been shewn what monies had been illegally received, and why and wherein the receipt thereof was illegal. And that the said plea does not show that the supposed illegality was not occasioned by the act of the said Henry James; and for that the said plea is confined to such monies as were received by the said Henry James during the continuance of his said appointment in that plea mentioned, or some other or future appointment, whereas the condition of the said writing obligatory is general, and extends to all monies received by virtue and for the purposes of the said act, and relative to the collectorship of rates, whether the same should have been received during the continuance of such appointments or at any other time.—Joinder in demurrer.

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The defendants' points, marked for argument, were,—that the last plea is good, inasmuch as it alleges a substantial performance of the condition of the bond, according to the true intention thereof, which intention was merely to insure the due collection, and payment over by the collector to the treasurer, of all monies which he could legally collect, and had legally received in his office of collector, and not to insure the collection or payment over of rates which the collector was not authorized by his office to collect.

Willes, in support of the demurrer.—Independently of the special grounds of demurrer to this plea, it shews neither a performance of the condition of the bond, nor an excuse for non-performance. It is consistent with the plea that a rate may have been made with some trifling irregularity in it, and which the rate payers, either through good feeling or from a desire to avoid litigation, did not choose to contest. Then is the rate collector, the mere

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servant of the commissioners, and who has received the amount of such a rate for them, to be permitted to set up its irregularity as an excuse for not giving an account of the monies collected under it? That would be highly inconvenient, and also contrary to the principle deducible from *Com. Dig., Accompt, A.*, where it is stated to be a good plea in account, "*that the plaintiff was a disseisor, and that the disseisee hath re-entered.*" So here, the defendants ought at least to have shewn that the party is liable to refund the money received.—He was then stopped by the Court, who called upon

E. V. Williams to support the plea.—The plea is good, as shewing a substantial performance of the condition of the bond. The terms of the condition must, according to *Lord Arlington v. Merrick (a)*, and the authorities cited in the note to that case, be construed with reference to the recital; and it is recited here, that the defendant, "Henry James, hath been duly elected and appointed collector of the *rates due and payable under and by virtue of the said act*, and hath been called upon to give security for the due performance of the said office of collector of the rates." The condition cannot, therefore, apply to an irregular rate, for that would not be "*due and payable under and by virtue of the act.*" In *Nares v. Rowles (b)*, the bond declared on was taken to secure the collection of duties imposed by statute, and the defendant moved in arrest of judgment, on the ground that the duties were not authorized by the act: and Lord *Ellenborough*, C. J., said, "Looking at the condition of this bond as it appears upon the record, I cannot say that if the rates were collected without authority, the collector could be called upon to pay them over, because he would be answerable to the individuals from whom he had illegally

(a) 2 Wms. Saund. 403.

(b) 14 East, 510.

received the money, and would be entitled to retain it for his own indemnity." [Parke, B.—That dictum surely ought to be qualified; for if money be paid with knowledge of the facts, it cannot be recovered back. Must not the collector pay over to the commissioners all monies received by him for them *as rates*?] That is not the question here. The question is, whether monies not received by virtue of the act come within the terms of this condition. The defendant James may perhaps be liable to the commissioners in an action for money had and received, though the money be collected under an irregular rate; but his sureties have a right to shew, by their plea, that the money does not come within the terms of the condition (a). They are responsible for his official receipts alone: he himself may be answerable for his unofficial or extra-official receipts also; but his sureties have only bound themselves in respect of the monies which shall have come into his hands officially; and if their plea discloses that no monies can possibly have so come to his hands, it affords a good answer to the action. [He cited *The Wardens of St. Saviour's, Southwark*, v. *Bostock* (b), and *Horton v. Day*, cited by *Twysden, J.*, in *Lord Arlington v. Merrick* (c).] As to the special grounds of demurrer, they are pointed to the allegation in the plea, that Henry James did not "legally receive any money by virtue or for the purposes of the said act, or relative to the collectorship of the said rates;" but they are not sufficiently pointed to the averment, "that during the continuance of the said appointment, no rate was made or in any way existed, which he, the said Henry James, could legally or according to law demand or obtain by virtue of his said office." This allegation, for the reasons already urged, affords a substantial answer to the action. The Court

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(a) See 1 Wms. Saund. 414, n. 5.

(b) 2 N. R. 175.

(c) 2 Saund. 414.

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when the plea shews that there was no rate in existence which he could legally collect.

Willes, in reply.—The plea, if bad as to the principal, is bad also as to the sureties; and, admitting the general principle that the condition must be construed with reference to the recital, still the language of it is large enough to include the case of an irregular rate. There is a section in the local act giving protection to persons acting in pursuance of its provisions, which would be unnecessary and useless unless it extended to irregular acts, and therefore must be construed to extend to them (a); and the condition of the bond should have a similar construction. [*Parke*, B.—But unless there are other monies to be received by the collectors besides the rates, that part of the plea relied upon by Mr. *Williams* is a substantial answer to the action, for it shews that there was no rate in existence which James could legally collect, and the Court cannot presume that he collected an illegal rate.] The act mentions mortgage monies. [*Parke*, B.—They are not within the province of the rate collectors.] At all events, the plea is incorrect in point of form; for it is a negative pregnant, and leaves it ambiguous whether the defence is that no money was received at all, or that it was received in fact, but illegally. *Bac. Abr.*, Pleas and Pleadings, title “Negative Pregnant.” [*Parke*, B.—That objection is not pointed to the allegation relied on by the defendants.] Then that allegation is bad, as tending to raise an issue on matter of law. It should have shewn as a fact in what the alleged illegality of the rate consisted, and ought not to have left it to a jury to decide whether a legal rate was made or not: *Abbot of Strata Mercella’s case* (b), *Hume v. Liversidge* (c),

(a) See *Butler v. Ford*, 1 C. & M. 662.

(b) 9 Rep. 24.

(c) 1 C. & M. 332.

Ransford v. Copeland (a). *Hume v. Liversidge* shews that this objection is sufficiently raised by the statement in the demurrer, that the plaintiff cannot take any certain issue on the plea. [*Parke, B.*—The context of the language used in setting forth the causes of demurrer, shews that that objection also is pointed to the allegation in the plea as to the illegal receipts of the money, which may be rejected as surplusage, and not to the statement, that “no rate was made, or in any way existed, which he, the said Henry James, could legally or according to law demand or obtain by virtue of his said office.” That allegation must be considered as if it were pleaded alone, and came before the court on general demurrer. The rest of the plea, which is specially demurred to, may be rejected as surplusage. You had better amend.]

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LORD ABINGER, C. B.—The Court were at first disposed to decide with Mr. *Willes*, on the ground that the collector should not be permitted to set up an irregularity in the rate as a defence to the action. But the authorities referred to by Mr. *Williams* seem to shew that the condition must be confined to monies received by the collector as such, in pursuance of the act. That part of the plea which shews that no rate existed which the defendant James could legally collect, is therefore a sufficient answer in substance, and the special grounds of demurrer to it are not pointed out. The plaintiff may have leave to amend.

PARKE, B.—The plea would have been bad on special demurrer, had the objection been sufficiently raised. It should have stated, either that no rate was made, or have shewn in what respect it was illegal. But the demurrer does not raise this objection to the averment that no rate was made, or in any way existed, which the defendant could

(a) 1 Nev. & Per. 671; 6 Ad. & Ell. 482.

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legally or according to law collect, &c., and that part of the plea appears to me a sufficient excuse of performance of the condition, as far as it relates to James accounting for monies received by him as collector.

GURNEY, B., and ROLFE, B., concurred.

Leave to amend, otherwise

Judgment for the defendants.

SCARFE v. HALLIFAX, Esq. (a)

The sheriff seized goods in the possession of S., to satisfy a *fi. fa.* issued against him upon a judgment of nonsuit for £67. S. had previously conveyed all his estate and effects to H. by a deed which it was contended was fraudulent and void against creditors: and H. gave notice to the sheriff's officer not to sell, and demanded the goods. The

officer refused to deliver them except on payment of £97, (the additional £30 being claimed for poundage, expenses, &c.) which the person sent by H. to demand the goods paid under protest. The sheriff, being ruled to return the writ, returned that he had levied of the goods and chattels of the plaintiff S. the sum of £67. In an action for money had and received, brought by S. against the sheriff to recover back the £30:—*Held*, that it was not necessary to prove a tender of the £67.

Held, also, that a letter from the under-sheriff to the officer in possession, directing him to demand only the £67, if S. came to pay the amount of the execution, was not admissible in evidence on behalf of the defendants.

Held, however, that it was a question for the jury, and ought to have been left to them, whether the money paid to redeem the goods was the money of S. or not, and that if it was not, he was not entitled to recover: and that the sheriff was not estopped by his return to say that the excess beyond the £67 was not the money of S.

(a) This case was by mistake omitted in its proper order.

(b) See *Scarfe v. Morgan*, 4 M. & W. 270.

veyance the defendant contended to be fraudulent and void as against creditors; and Hayward and Insby gave notice to the sheriff's officer not to sell, and sent to him a person of the name of Woods, who demanded the goods, and on his refusal to deliver them without payment of the whole sum of 97*l.* 13*s.*, paid that amount under protest, and took a receipt as for a payment by Hayward. The plaintiff afterwards ruled the sheriff to return the fieri facias, and he returned that he had levied of the goods and chattels of the plaintiff, Scarfe, 67*l.* 11*s.* 6*d.* The defendant offered in evidence a letter from the under-sheriff to the officer, instructing him not to demand the greater sum, if the plaintiff came to pay the amount of the execution, but the less only. This letter was rejected. For the defendant, several objections were made to the plaintiff's right to recover. First, that the action could not be maintained without proof of a tender to the defendant of the precise sum due from the plaintiff. The learned judge overruled this objection, being of opinion that an action would lie for the excess, which the sheriff had no right to claim, and could not therefore retain, and that it would lie without any proof of tender of the sum actually due; but he reserved to the defendant's counsel leave to move to enter a nonsuit on this objection. Secondly, it was contended that the money was not the plaintiff's, but that of his assignees: thirdly, that if it was the plaintiff's money, it could not be recovered, because the goods were not his: a payment by one to redeem the goods of another was not a payment under duress, but voluntary. This last objection the learned Judge overruled. On the case going to the jury, his Lordship was requested to leave to them the question whether the money was the plaintiff's or not, but he declined to do so, and the plaintiff had a verdict for 30*l.* 1*s.* 6*d.* In the following Michaelmas Term,

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Byles moved, pursuant to the leave reserved, to enter a

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nonsuit, or for a new trial, and renewed the objections taken at the trial.—First, the plaintiff ought either to have proved a tender of the sum really due, or to have shewn that a tender was dispensed with. In *Astley v. Reynolds* (a), which was an action of a similar nature, a tender was proved; so it was also in *Leake v. Pigott* (b). Suppose this had been an action of trover for the goods: the plaintiff could not have recovered without proving a tender of the debt. There being, then, no evidence of a tender, or of a dispensation with it, there was no evidence to go to the jury of any extortion: and this action, though not founded expressly upon the stat. 1 Vict. c. 55, is in effect an action for extortion. [*Parke, B.*—The money was paid to redeem the goods, and so under a species of duress. Whosoever money it was, he was entitled to recover the surplus beyond the sum really due. If they were Scarfe's goods, the circumstances under which they were seized and retained are sufficient to constitute extortion from him. The sheriff had no right to hold the goods as against any body, except for the amount of the levy.]

Secondly, the letter from the under sheriff ought to have been received in evidence, to shew the real nature of the instructions under which he made the levy. [*Parke, B.*—The officer represented the sheriff for all purposes relative to the execution of the writ, and the sheriff was responsible for him, whether he disobeyed his instructions or not.]

Thirdly, the question whether the money or the goods were the plaintiff's or not, ought to have been left to the jury. The foundation of his claim is, that the defendant would not give up the goods until he, the plaintiff, had paid out of his own money an illegal claim. Neither can the plaintiff sue in respect of duress exercised upon another man's goods.

Upon the last point only a rule was granted; against which, in the following Hilary Term,

(a) 2 Stra. 915.

(b) Selw. N. P. 87.

Biggs, Andrews and Gunning shewed cause, and contended, first, that the learned judge did substantially leave the question to the jury whether the money was the plaintiff's; and secondly, that if it was the plaintiff's money, it was paid under duress of his goods, for the defendant by his return was estopped to say that the goods seized were not those of the plaintiff.

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PER CURIAM.—As to the first point, we have referred to the report of the learned Judge, and we are not satisfied that the question was properly left to the jury: and if the money was not the plaintiff's, and the goods had been fraudulently assigned to defraud the creditors, they were the goods of the assignees as against the plaintiff, and all the world except creditors, and consequently the payment was not made under duress of *his* goods. The sheriff is not estopped by the return, for it affirms only that, to the extent of the levy, it had been made on the plaintiff's goods; and that is perfectly true, for, notwithstanding the assignment, they were (assuming it to have been fraudulent) for the purposes of the execution, and to that extent, the goods of the plaintiff: but beyond that, they were the goods of the assignees, and the sheriff is not, therefore, estopped to contend that they were so. The rule must be absolute for a new trial.

Rule absolute accordingly.

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A testator, by his will, devised as follows:—

"I give my house, gardens, &c., at G., to Mrs. S. S., and her heirs, if she has any child; if not, then, after the decease of herself and her husband, Mr. R. S., I give it to F. M. and her heirs." S. S. had a child, who was living at the date of the will, but who died four days after the date of it, in the lifetime of the testator:—
Held, that S. S. took an estate tail; and that upon her death without heirs of her body, the property passed to F. M.

THIS was an action of ejectment, brought by the lessor of the plaintiff against the defendants, to recover the possession of a house and premises at Gittesham, in the county of Devon.

The defendants having entered into the usual consent rule to confess lease, entry, and ouster, and pleaded "not guilty," with a view to obtain the opinion of the Court on the point at issue, the parties, under the order of *Parke*, B., stated the following case:—

The lessor of the plaintiff is a gentleman residing at Cheltenham, in the county of Gloucester, and claims to be entitled to the property in question as tenant by the curtesy, in right of his late wife Frances Jearrad, deceased, formerly Frances Macdonald, hereinafter mentioned.—Nicholas Pridice, late of Honiton, in the county of Devon, made his last will and testament, executed and attested in the manner then required by law for devising freehold estates, of which the following is a copy:—"In the name of God, amen. I, Nicholas Pridice, of Honiton, in the county of Devon, do give and bequeath unto my niece's daughter, Frances Macdonald, as under:—first, I give her my house and appurtenances thereunto belonging, situate in Gerrard-street, Soho, London, which now Thomas Fitzhenry, Esq., lives in, freehold; and I likewise give her my two houses in Featherstone Buildings, where now Mr. William Somervill lives, No. 21, and Mrs. Griffiths, No. 20, near Holborn, for a term of years." Then came other bequests to her, after which he bequeathed as follows:—"I likewise give my house, gardens, and orchers, where *likes* Mrs. Warren, at Gittesham, in Devonshire, to Mrs. Sarah Smark, and *has* heirs, if she

has any child; if not, after the decease of she and her husband, Mr. Richard Smark, then I give it to the above Frances Macdonald and her heirs; and I do hereby make and constitute Mr. Richard Smark my executor of this my last will and testament; Frances Macdonald to pay him £10 for his trouble. February 18th, 1803."

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The testator Nicholas Pridice died in the month of December, 1804, without altering or revoking his said will. At the date of the testator's will, and from thenceforth to the time of his death, he was seised to him and his heirs in fee-simple of the house and premises at Gittesham, devised by him to Sarah Smark.

Sarah Smark had a child born on the 21st day of November, 1802, but which died on the 22nd day of February, 1803, in the lifetime of the testator; and on the 27th day of March, 1804, she had a still-born child.

Mrs. Smark's husband died in the month of December, 1806, in her lifetime, and she continued in possession of the property up to the time of her decease, on the 12th day of May, 1839, having by her will, dated the 19th day of April, 1834, devised the property in question to the defendants and their heirs, upon certain trusts in her will expressed.

Frances Macdonald, in the testator's will named, after his decease, intermarried with Robert William Jearrad, the lessor of the plaintiff; and died subsequently to Sarah Smark.

The question submitted for the opinion of the Court is, whether, under the devise in the will of Nicholas Pridice, the said Sarah Smark was, at the time of her death, seised for an absolute and indefeasible estate of inheritance in fee-simple of the property thereby devised to her, or whether, under the circumstances hereinbefore stated, the devise over to Mrs. Frances Macdonald and her heirs took effect. If the Court should be of opinion that Mrs. Smark was, at the time of her death, seised of the devised

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property for an absolute and indefeasible estate of inheritance in fee-simple, then a judgment shall be entered against the plaintiff of nolle prosequi, immediately after the decision of the case, or otherwise as the Court shall think fit; but if, on the other hand, the Court shall be of opinion that the limitation over to Frances Macdonald, afterwards Frances Jearrad, took effect, then judgment is to be entered for the lessor of the plaintiff against the defendants by confession, for 1s. damages, immediately after the decision of the case, or otherwise as the Court may think fit.

Hodgson, for the lessor of the plaintiff.—The lessor of the plaintiff claims as tenant by the curtesy, on the ground that the fee in possession of the property in question became vested in Frances, his late wife, called in the will Frances Macdonald. The case does not expressly state that there has been any issue of the marriage, but this the Court will understand and presume to have been the fact, as the case has been sanctioned by one of the learned Judges of the Court. [To this the Court intimated their assent.] The case states that Sarah Smark had in fact one child born alive, and who died in the testator's life time, and another child born dead. At his death she was without issue. Now the gift is to her, and (assuming that the Court will read the word "has" for "her") to her heirs, *if she has any child*. It could not be the intention to give her the fee absolutely, because there is a gift over to Frances Macdonald, to take effect in some event which the testator contemplated, and has expressed by the negative of Sarah Smark having any child. There are three constructions to which the gift is open. First, that S. Smark was to take the fee upon the birth of a child, and Frances Macdonald to take on the opposite event. Secondly, that S. Smark was to take the fee

determinable at her death without a child then living. *Esch. of Pleas*,
Thirdly, that she took an estate tail. 1840.

1. It is plain that the testator, by the way in which he joined the words "heirs" and "child," meant the same thing by both terms. But the sense in which both agree is that of "heirs of the body." "Child" is nomen generale, and may stand for issue, or heirs of the body, as "son" was held, in *Mellish v. Mellish* (a), to stand for male issue, or heirs male of the body. The intention was, not that the birth of a child should vest the absolute fee in the mother, with the power to defeat that child, nor that it should be a condition precedent to the vesting of an estate in her, but that it should be necessary, in order to fulfil the character of the persons intended by the word "heirs," that they should be children or issue of her body.

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2. There is nothing in the devise to support the second construction. If the words are to be construed as giving Sarah Smark an estate, either in fee or for life, with a gift over on the event of her never having any issue or heirs of her body, such a gift, unconfined, was void for remoteness. There is nothing to confine it to a failure in her lifetime, except the words already observed upon, which, properly construed, can have no such meaning.

3. The remaining construction is, that Sarah Smark took an estate tail. This species of estate is an inheritance, but limited in its character. The heirs to take must take by descent, and with most of the qualities of inheritance; but none can take but such as are issue of the body of the donee. Here the testator says, Sarah Smark is to have an estate which is to go to her heirs, not generally, nor in all events, but *if she has a child*. Is it not natural, and even necessary, to supply the words "to take as such heirs?" It would thus be, "to her and her heirs, if she shall have a child to be her heir." But, fur-

(a) 2 B. & Cr. 520; 3 D. & R. 804.

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ther, a child, to be "heir of the body" of its parent, must survive the parent, and "issue," to be heirs of the body, must survive the ancestor. The meaning, therefore, of the devise, taken altogether, is, that she was to take an estate of inheritance, provided she had a child or issue to succeed as heir of her body, and to endure as long as she had such child or issue; and that is clearly an estate tail.

Another reason, if any were wanted, for the construction contended for by the plaintiff is, that the Court can, by that construction, give vested estates to both objects of the testator's bounty. If the first of the above constructions could prevail, the fee would be in the heir till Sarah Smark had a child born, and would then shift to her. If the second should prevail, the gift over would be an executory devise, or at most a contingent remainder. But upon the third construction, that of an estate tail, Sarah Smark would take a qualified estate well known to the law, and Frances Macdonald would take a vested estate in remainder. Where the construction is doubtful, the Courts prefer a remainder to an executory devise (*a*), and a *vested* to a *contingent* remainder (*b*).

Erle, contra.—If there be no ambiguity on the face of the will, the Court are bound to give effect to it according to the intention of the testator, as expressed in it; and in this case there is no ambiguity. Taking it that the testator did not know whether Mrs. Smark had a child or not, the intention clearly was to give her the fee-simple if she should have a child or children; if not, then that it was to go over at her death to Frances Macdonald. He gives the property to Mrs. Smark and her heirs: if it had stopped there, the devise would clearly have created a fee-simple; but then follows the condition, "if she has any child:" and as she had a child, the condition was

(*a*) *Purefoy v. Rogers*, 2 Saund. 380 (*b*), (*b*) *Ives v. Legge*, 3 T. R. 488, n.

satisfied, and the property went absolutely to her. There is nothing stated to shew a different intention, or any conflicting or ambiguous meaning. It is quite possible for the testator to have intended to say, "I mean her to have the estate if she has had a child." [Rolfe, B.—It would be strange for him to say, "I mean Sarah Smark to have the estate in fee-simple if she has a child," when he knows that she has had one.] The words are applicable to a past or future child; it is either *has*, or *shall have*. This matter was considered with respect to personal property, in *Wall v. Tomlinson* (a). In that case there was a residuary bequest to Harriet Wittle Strangeway for ever, "in case she should have legitimate children: in failure of which" to go over. She afterwards married one William Cowles; and having only one child born alive, who died before her, it was held that she was entitled absolutely. [Rolfe, B.—The words which would operate to create an estate tail, would give an absolute interest in personal property.] There the Master of the Rolls, Sir William Grant, says, "The testator's object seems to have been, in the event of Mrs. Cowles having children, to give her the means of making a provision for them. It cannot be contended, that from the event of her having only one child, there is to be a different construction, so that in that case the child was to be left without a provision. As to the words, 'in failure of which,' it is very difficult in this case to give those words the construction of not having children at her death, which would tie it up during her whole life." Suppose, in this case, Mrs. Smark had several children, and for their benefit wished to mortgage or sell the estate, to make provision for their education and maintenance, she would not be able to do so if this devise were held to confer a life estate only, which would be a great hardship on them, and one which the testator never could have intended.

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(a) 16 Ves. 413.

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Hodgson, in reply.—It is not meant to be contended that Sarah Smark took a life estate, but an estate tail; which estate she could, of course, by a proper assurance, convert into a fee, and thereby gain the power of charging or disposing of it to answer the necessities of her family. The case of *Wall v. Tomlinson* was one of personal estate, and it was held that the first taker was entitled to the absolute interest. That is consistent with the Court having thought the words such as would have created an estate tail in real property, as has already been observed from the Bench. It is agreed that the testator's intention is to prevail: the question is, whether, upon the true construction of the devise, he did not use the word "heirs" in the sense of "heirs of the body."

Lord ABINGER, C. B.—I think the proper construction for us to adopt is that for which Mr Hodgson contends. It would seem, from some part of the testator's will, that he was not precisely acquainted with technical language, for there is some obscurity in his expressions. However, we must take the whole together, and put the best construction upon it that we can. It appears to me, that what the testator intended clearly was, that, at all events, Sarah Smark should have an estate for her life. How could he effect that intention? If he had given her an estate in fee, it would have defeated all the remainders over. But he says, if she has no child, that is, after her decease, in that case I give the property over to Frances Macdonald and her heirs. According to Mr. *Erle's* construction, if she did not leave any children at her decease, she has it to her and her heirs absolutely. It appears to me, however, that the testator probably considered the word *heirs* to mean children of the body, and intended that the property should go to her for her life, and at her death, to her children, if any; but if she should have no children to be heirs of her body, then that it should go over to Frances

Macdonald. That seems the reasonable construction of the will, and it is justified by authorities. According to Mr. *Erle's* construction, if she had no child, she would take nothing. It appears to me that she took an estate tail, her "heirs" being interpreted to mean the heirs of her body.

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GURNEY, B.—I think the intention of the testator was clearly to give the estate over to Frances Macdonald, if Sarah Smark died without children.

ROLFE, B.—I am of the same opinion. The argument of Mr. *Erle* might be urged in many cases where the word *heirs* is not qualified; but here, by the subsequent words, it is cut down to mean *heirs of the body*. The testator says, "I give to Sarah Smark and her heirs, if she has any child;" that is, I presume, to her and her heirs if she has children; in other words, to her heirs, being the heirs of her body; and in default of these, then over. I think that is the most reasonable construction; but of course, in cases of this sort, where people make their own wills, we are obliged to decide a little in the dark, and to guess at the intention of the testator.

Judgment for the plaintiff.

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A. entered into partnership with B. & C., who had previously carried on the same trade together, and who shortly afterwards became bankrupt: and by an agreement, to which A., and the assignees of B. & C., were parties, it was agreed that A. should realize the assets and liquidate the debts of the firm; and that the official assignee of the bankrupts should be empowered by A. to collect the outstanding debts, and pay the amount to S. & Co., bankers, to the account of A., being allowed the usual per centage:—*Held*, that A. could not alone sue the official assignee, in an action of money had and received, for monies collected by him under this agreement, which remained in his hands, and of which he had rendered an account to A.

ASSUMPSIT for money had and received. Pleas, non assumpsit, and a set-off for money paid, and on an account stated. Issues thereon. At the trial before *Rolfe*, B., at the Middlesex Sittings after last Trinity Term, the facts appeared to be as follows:—In January, 1838, the plaintiff and two other persons of the name of Bailey and Potter, entered into partnership in the business of wholesale druggists, which Bailey and Potter had previously conducted together. Bailey and Potter shortly afterwards became bankrupt, and the defendant was the official assignee of their estate. On the 19th of May, 1838, an agreement was entered into, between the defendant and the elected assignees of Bailey and Potter on the one part, and the plaintiff on the other, with a view of liquidating the affairs of the late firm, of which the following is a copy:—

“It is this day agreed between the assignees of Bailey and Potter on the one side, and Mr. Kensington Lewis on the other, as follows:—

“1. That with a view to liquidate the affairs of the above firm, Mr. Lewis shall be empowered to realize the assets of the new firm, for the purpose of paying the debts and liabilities due by the new firm, as and when the same became payable; it being understood and agreed, that the partnership of the new firm is to date from the 1st of January, 1838, inclusive; without prejudice to Mr. Lewis’s right to contest the payment of any securities or bills drawn, accepted, or endorsed, for which the new firm have not received value; and that he shall have full power, with the consent of Mr. Edwards, to compound debts, or to give time, either in the whole or in part, as he shall think fit.

“2nd. That Mr. Lewis provide the funds to cover any deficiency, the amount of such deficiency to be consi-

dered a primary charge upon the remaining assets of the new firm.

"3rd. That Mr. Lewis shall be allowed his reasonable costs and expenses incurred in liquidating the said partnership accounts, and also his costs in and about the proceedings in Chancery.

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"4th. That the stock, lease, plant, and good-will be forthwith sold, either in one lot, or the lease and good-will at an agreed sum, taking the stock and plant at a valuation, and that Mr. Lewis be at liberty to become the purchaser, at an advance of £5 per cent. upon the highest offer which the assignees shall be prepared to accept.

"5th. That if in the result there shall be a balance in favour of Mr. Lewis as such liquidating partner, he shall be entitled to prove for the amount of such balance; or if the balance be in favour of the said Bailey and Potter, then the amount shall be paid to the assignees, or other uncollected estate assigned over to them, after all amounts due to Mr. Lewis and the creditors are fully satisfied.

"6th. That Mr. Lewis be authorized to receive and cancel the bills held by Mr. Abbott.

"7th. That the liquidation of the said partnership accounts, and all that relate thereto, be conducted agreeably to the articles of copartnership lately subsisting between the said Bailey, Potter, and Lewis, as far as the same may be applicable to the present state of things.

"8th. That the assignees, or their accountants, shall be at liberty to inspect Mr. Lewis's liquidation account at all reasonable times.

"9th. That the assets of the new firm shall be considered subject to the following charges, and in the following order of succession [setting out certain charges].

"10th. That Mr. Edwards be empowered by Mr. Lewis to collect the outstanding debts due to the new firm, and pay the amount to Messrs. Stone & Co. to the account of Mr. Lewis, being allowed the usual per centage.

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“ 11th. That Mr. Edwards be repaid the sums advanced by him in the purchase of goods, out of the first receipts for goods sold since the date of the fiat.

(Signed)

“ K. LEWIS,

“ CROWDER & MAYNARD,

“ (for the assignees.)”

After the execution of this agreement, the defendant, pursuant to the 10th clause, collected the debts due to the firm of Bailey & Potter, to the amount of £4050, of which he rendered an account to the plaintiff. To recover this amount the present action was brought, the plaintiff contending, that upon the true construction of the agreement, it was, when in the hands of the defendant, money had and received to his, the plaintiff's, use. The learned Judge, however, thought the plaintiff had no right to maintain the action, and accordingly directed a nonsuit, giving the plaintiff leave to move to enter a verdict for him for the amount claimed, subject to deductions for such payments as an arbitrator should think ought to be allowed.

In the beginning of this term Sir *F. Pollock* obtained a rule accordingly, against which

Crowder and *C. A. Wood* shewed cause, and contended that the agreement could not be construed to operate as an assignment to the plaintiff of the whole or any part of the outstanding funds of the partnership, to be collected by the defendant—which alone could entitle the plaintiff to sue in this form of action—since at the time of the agreement there was no certainty as to what might be found to be due; and that at all events the plaintiff could not sue alone, for that he was only a tenant in common of the fund with the assignees of the other partners.—The Court called upon

Sir *F. Pollock* and *Cowling*, in support of the rule.—By the operation of this agreement, the defendant became a

mere receiver for the plaintiff. He was bound, when he received the money, to pay it into the bank to the plaintiff's account; but the plaintiff might excuse him from the necessity of so paying it in, and receive it himself. If, according to the argument on the other side, the parties are tenants in common of the fund, what meaning is there in the provision that the defendant shall pay the money to the plaintiff's account? And even if they be, it may be doubted whether the solvent partner may not sue alone, without joining the assignees of the bankrupt partners. Assignees of a bankrupt take only such an interest as was equitably as well as legally vested in the bankrupt. [*Parke, B.*—It is perfectly clear that the assignees ought to join with the solvent partner, unless by the agreement their interest is transferred to him. The law is clearly laid down by *Littledale, J.*, in *Carvalho v. Burn (a)*.] At all events, partners may always, by express agreement, isolate their accounts. "There may be special bargains by which particular transactions are insulated and separated from the general winding up of the concern, and are taken out of the general law of partnership:" per *Bayley, B.*, in *Jackson v. Stopherd (b)*: *Coffee v. Brian (c)*. If the plaintiff cannot sue upon the special promise in the agreement, the promise is altogether futile. The defendant's own account is evidence of an appropriation to the plaintiff in pursuance of the agreement: but even if there was no appropriation, the plaintiff had a right to sue for money had and received. Nothing remained to be done but the payment over of the money for his use. It is in the nature of an equitable assignment of the fund to the plaintiff. In *Grissell v. Robinson (d)*, *Tindal, C. J.*, says, "Where anything remains to be done under the contract, of which the plaintiff must prove performance,

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(a) 4 B. & Adol. 382; 1 Nev. & (c) 3 Bing. 54; 10 Moore, 341.
M. 700.

(d) 3 Bing. N. C. 10; 3 Scott, 329.

(b) 2 C. & M. 366.

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the action should be on the special contract; but where all has been done, and the plaintiff has only to prove payment of the money, then he may recover on the general count for money paid." [Parke, B.—That appears to be a little at variance with the law as laid down in *Spencer v. Parry* (a). At all events, it does not apply to money had and received. How much of the outstanding funds do you say is assigned to the plaintiff by this agreement?—all of them, or all that the defendant collects?] All that he collects under the 10th clause of the agreement. [Parke, B.—It is difficult to say there is an assignment of them, because the subject matter of the assignment is uncertain; non constat de corpore.] The defendant must be taken, when he received them, to have appropriated them to the plaintiff, and the only thing remaining to be done is the form of going and paying them into the bank.

Cur. adv. vult.

The judgment of the Court was delivered on a subsequent day by

PARKE, B.—The question in this case was, whether the plaintiff alone could sue the defendant for money had and received under the following circumstances:—

The plaintiff, Bailey, and Potter, entered into partnership in the beginning of the year 1838, in a business which Bailey and Potter had previously conducted. Soon afterwards the two latter became bankrupts, and the defendant was appointed the official assignee, and other persons the assignees of their estate. The plaintiff, as solvent partner, was liable to pay the partnership debts of the firm of which he was a member; and on the 19th of May, 1838, an agreement was entered into between the plaintiff,

(a) 3 Ad. & Ell. 331; 4 Nev. & M. 771.

and the defendant and the other assignees, for liquidating the affairs of the concern. After the agreement, the defendant collected £4000 and upwards, of the debts due to the partnership; and the question is, whether that sum of money could be recovered against him, in this action for money had and received, by the plaintiff.

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This depends upon the construction and effect of the agreement. It consists of several articles. [His lordship stated them]. The principal question is as to the meaning of the 10th article, and what its legal effect is.

Its meaning certainly is, that Mr. Edwards, when empowered by the plaintiff to collect, should collect the debts, and should pay such debts as he should collect to Stone & Co., for the plaintiff's account: and as Stone & Co. were not stake-holders, and had no trust to perform for any other party than Lewis, it was just the same as if the monies had been agreed to be paid to the plaintiff himself, which, it may be well contended, is equivalent to an undertaking to hold the monies when received on the plaintiff's account. But admitting this to be so, the question is, whether this agreement is obligatory, and operates as an assignment to the plaintiff alone, for a good consideration, of the funds belonging to the assignees jointly with the plaintiff; and we are of opinion that it does not. There is no consideration moving from the plaintiff, sufficient to make the agreement binding on all parties, and capable of being enforced as a matter of legal obligation. The agreement imposes upon the plaintiff no burthen which he was not before liable to: the assignees and defendant have no benefit which they had not before. The whole instrument is nothing more than a statement of their relative duties and rights, already existing, with some matters of arrangement, which cannot be made the subject of an action. The 10th section might possibly be construed to mean that the plaintiff should abstain to collect any of the outstanding debts, and give up the whole

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to the defendant, which would constitute a good consideration for the defendant's promise to collect and pay over; but we do not think this is the fair construction: there is nothing to prevent the plaintiff from collecting, if he thought proper, as well as the defendant. We are therefore of opinion, that there is nothing in this agreement to divest the assignees of the bankrupts of their legal interest in the joint funds, and transfer it to the plaintiff; and consequently that the plaintiff alone cannot maintain this action: and he certainly cannot without having such a transfer, as it is clear that the shares of the bankrupt parties vested in the assignees originally, and there is no validity in the argument that, in consequence of the little prospect of a surplus to the estate of the bankrupts, the assignees took no interest: the doctrine so clearly laid down in the case of *Carvalho v. Burn* (a), leaves no doubt upon this point: and if it has not been transferred from them to the solvent partner, he alone cannot sue.

The rule must therefore be discharged.

Rule discharged.

(a) 4 B. & Adol. 382.

ELLIOTT and Wife, Administratrix of Elizabeth Lane, deceased, v. KEMP.

TROVER for furniture, &c. Pleas, first, not guilty secondly, that the female plaintiff was not possessed as
L. was possessed of furniture and other property, and on his death, intestate, in 1827, the furniture was removed by his widow to another house which she resided, until her death in 1832, with her daughter E., and continued during period to use the furniture. In October, 1829, the widow caused the furniture to be valued order to her taking out administration to L., which she afterwards did. In 1838, the furniture was sold by the defendant, (who had married another daughter of L.) with E.'s concurrence. In 1840, (disputes having arisen about the distribution of the proceeds), E. took out administration to her mother:—*Held*, that E. could not maintain trover for the furniture, without taken out administration de bonis non to L.

her own property, as administratrix, of the goods and chattels in the declaration mentioned; on which issues were joined. At the trial before *Parke*, B., at the London Sittings in last Trinity Term, the facts appeared to be as follow:—

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The intestate, Mrs. Lane, was the mother of the plaintiff Mrs. Elliott, and also of the defendant's wife. Mrs. Lane's husband died in 1827, and on his death she removed the greater part of his household furniture to another house, in which she resided until her death with her daughter, afterwards Mrs. Elliott, and continued to use the furniture. A small part of the furniture, for which there was not room in that house, was at the same time sent to the defendant's house. In October, 1829, Mrs. Lane caused the furniture and other effects of her late husband to be valued, in order to her taking out administration to him, which she afterwards did. Some leasehold property of his was subsequently sold, but it did not appear whether the proceeds were applied to the payment of his debts. Mrs. Lane died in July, 1832. In 1838, the whole of the furniture was sold by the defendant's order, with Mrs. Elliott's concurrence: but some disputes arising about the distribution of the proceeds, Mrs. Elliott, in the year 1840, took out administration to her mother, and, as her administratrix, brought this action for an alleged conversion by the sale of the furniture in 1838.

Upon this state of facts, the learned Judge thought the plaintiffs were not entitled to recover, but that administration de bonis non should have been taken out to the estate of Mr. Lane. For the plaintiffs it was contended, first, that the defendant, who was a mere wrong doer, could not dispute the title of Mrs. Lane, who had been for several years in actual possession of the furniture in question, or of the plaintiff as her representative; and next, that there was evidence to go to the jury that Mrs. Lane had become entitled in her own right to the furniture.

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The first point was reserved for the opinion of the Court, and it was agreed that the question upon the evidence also, instead of being left to the jury, should be submitted to the Court, and its effect determined by them; and a verdict was thereupon taken for the defendant on the second issue, leave being reserved to the plaintiff to move to set it aside, and enter a verdict for the plaintiff, with £50 damages.

Bompas, Serjt., having obtained a rule nisi accordingly,

Humfrey, in this term, shewed cause, and contended, that it was clear upon the evidence that Mrs. Lane had no title except as the administratrix of her husband, to whom it was admitted that the furniture originally belonged; and therefore that the plaintiffs could derive no title from her, but ought, to entitle them to the possession, to have obtained administration de bonis non to the effects of Mr. Lane.—The Court desired to hear

Bompas, Serjt., and *Gurney*, in support of the rule.—There are two grounds, one of law, and the other of fact, on which the plaintiffs ought to recover. First, a *prima facie* case was proved in point of law, to which there was no answer on the part of the defendant. As against a *wrong-doer*, the actual possessor of any chattel may maintain an action for it. Nay, the mere *finder* of it, though he does not thereby acquire an absolute property or ownership, has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover: *Armory v. Delamotte* (a). So, possession under a general bailment, or under a transfer invalid for non-compliance with a statute, is sufficient title in trover against a stranger: *Sutton v. Buck* (b). So here, the proof of Mrs. Lane's having

(a) 1 Stra. 505.

(b) 2 Taunt. 302.

been in possession of this furniture for two years and a half, is sufficient evidence of title in her, as against a mere wrong-doer. [*Parke*, But here the wrong is done to no particular party in actual possession; the goods were then bona vacantia; then the question is, who has the *legal* right, by relation to the grant of administration. What defence would the defendant have against the party who should afterwards take out administration de bonis non?] A wrong doer may be answerable to more than one party. A person may be liable for use and occupation both to the party who put him into possession, and also to the paramount rightful owner. [*Parke*, B.—There he would have a right of indemnity against the party who put him into possession, and therefore ultimately would not be compelled to pay twice over.] *Primâ facie*, there were the goods of Mrs. Lane herself: if so, *primâ facie*, they belong to her representative. Then, can a party, who shews by evidence no right whatever, take them out of the possession of the representative? In *Crosskey v. Mills* (a), where the plaintiff, being in possession of the goods of an intestate under a bill of sale, employed the defendant, an auctioneer, to sell them, it was held, that notwithstanding notice to the contrary from the widow of the intestate, the defendant was bound to account to the plaintiff for the proceeds: and there *Parke*, B., says, “The plaintiff was the person who originally employed the defendant to sell. Therefore, *primâ facie*, the defendant was bound to account to the plaintiff. Admitting that the defendant could set up the *jus tertii*, and shew that he was liable to account to a third person, it is not shewn here that there was a title in any third person: no person has taken out letters of administration.” A real *jus tertii* must be shewn, not a mere possibility of one. Suppose a party is in possession of goods as bailee, under a responsibility to account for

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(a) 1 C., M. & R. 298.

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them to the real owner, cannot he sue a wrong doer in trover? Now the responsibility of an administrator, according to his bond given to the ordinary, is to make a true inventory of the goods of the intestate; well and truly to administer them according to law; to make a just and true account of his administration; and to deliver and pay the residue as the Judge by decree or sentence shall appoint. He is, therefore, a bailee under bond to distribute according to law, and to redeliver what he does not distribute. Has he not a right to enforce possession of the goods which he is so to account for and redeliver? [*Parke, B.*—The plaintiff is under no obligation by virtue of the bond entered into by Mrs. Lane. *Rolfe, B.*—The condition of the bond is, not that the party, his executors, administrators, &c., shall account, but only that the party himself shall make out an inventory and render an account.] Supposing these goods to have been part of the estate of the husband, yet by the conversion of them to her own use, the widow committed a breach of the bond, for which her estate is liable: *In the Goods of Hall* (a); *Archbishop of Canterbury v. Roberts* (b): then is not her representative entitled to the possession of them, in order to protect herself from that liability? In 2 Saund. 47 a., it is said, "Where an executor declares [in trover] upon the *possession* of his testator, and of a conversion by the defendant after his death, it is sufficient, because the property is vested in the executor, and that draws after it the possession in law."

But, secondly, these goods might, upon the facts proved, be considered as having been reserved to Mrs. Lane, as her share of her husband's property. They were valued, and for two years and a half afterwards she continued, with the knowledge of the other parties entitled, to use them as her own, and no claim was shewn to have been made to them. It was more natural that she should

(a) 1 Hagg. Cons. Rep. 130.

(b) 1 C. & M. 690.

keep than sell them. It is reasonable to suppose that on the sale of the leasehold property, the estate was, by agreement of the parties, so divided as that, the widow taking these goods as part of her share, the proportions were according to their respective rights. It is analogous to the case of a bequest of a legacy to an executor, in which case his assent is presumed, and mere possession is almost enough to vest it. Here the only facts leading to the contrary conclusion are, that five years before the goods were her husband's, and that she was his administratrix: but that does not rebut the presumption to be derived from her user of them, which, unless she had acquired a title to them as her own, could only be by a violation of her duty as administratrix, which will not be presumed.

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Cur. adv. vult.

On a subsequent day the judgment of the Court was delivered by

PARKE, B.—This case was argued a few days ago, on shewing cause against a rule nisi to enter a verdict for the plaintiff.

The facts were these:—The plaintiff, Mrs. Elliott, was the administratrix of her late mother Mrs. Lane, who was also the mother of the defendant's wife. Mrs. Lane's husband died in November, 1827. His household furniture was removed after his death by his widow to another house, in which she took up her residence with her daughter Mrs. Elliott: a small part, for which there was not room in that house, was sent to the defendant's. In October, 1829, the furniture and the effects of Lane were valued by Mrs. Lane, in order to take out administration to her husband, which she afterwards did, and died in July, 1832. The furniture at Mrs. Lane's was used by her; and some leaseholds of her late husband's were sold, but whether the proceeds were applied to the payment of her husband's debts, what was the amount of these debts, and whether Mrs. Lane had any funds of her own to pay

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them with, did not appear. After the death of Mrs. Lane, in 1838, the furniture, formerly Lane's, was sold, with Mrs. Elliott's concurrence, by order of the defendant; and some dispute having taken place about the proceeds between the parties entitled, Mrs. Elliott, in 1840, took out administration to her mother, and brought this action in that character for the conversion, which took place by the sale in 1838.

On the trial, it appeared to me that the plaintiffs were not entitled to recover, but that administration de bonis non should have been taken out of the estate of Mrs. Lane. My brother *Bompas* contended, that as the defendant was a wrong doer, he could not dispute the title of Mrs. Lane and the administratrix. This point was reserved. He also contended, that, at all events, there was evidence to go to the jury that Mrs. Lane had become entitled in her own right to the furniture afterwards sold. I should have left that evidence to the jury, but it was agreed on both sides, that it should be submitted to the Court above, and its effect determined by us, as well as the point of law which was reserved. On the motion for a new trial, the same objections were made, and very ably argued.

It is unnecessary, in this case, to decide the question, whether, in an action of trespass or trover for *personal* property, the simple fact of possession, which is unquestionably evidence of title, is *conclusive* evidence, and constitutes a complete title, *in all cases*, against a defendant who is a mere wrong doer, as it does in actions of trespass to real property, and in those actions for injuries to personal chattels, in which the plaintiff had a special property in such chattels; for in the present case the plaintiffs were not in possession of the chattels, the subject of this suit, at the time of the conversion; and the only way in which this action can be supported, is by virtue of the relation which takes place by law to the death of the deceased, in

favour of his personal representative, in all cases of intermediate injury to his chattels. But the title of the plaintiff as personal representative of Mrs. Lane, relates back to her death, with respect to these chattels only which were her own, and which vest in her administrator; and the simple question then is, whether the chattels in question were her own property. If they were not, the plaintiffs have no title whatever to them, and cannot maintain this action.

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It was ingeniously contended, that, even admitting that the effects were not Mrs. Lane's own, still the administration bond, into which Mrs. Lane no doubt entered, gave a sort of custody or special property in her husband's effects unadministered, until an administration de bonis non should be taken out: which special interest would enable him to maintain an action for their conversion after her death. But we are clearly of opinion that such is not the effect of the bond; her own administrator is liable to the extent of her assets, for all breaches of the condition of the bond; but he has no right or interest in the unadministered effects, all of which devolve on the administrator de bonis non after the death of the administratrix.

The only question then is, whether those chattels, which were formerly the husband's, became, by any means, his widow's in her own right: and this is the question of fact which we have to dispose of, by the consent of the parties, instead of the jury.

The administratrix might have acquired a title by payment of the debts of the intestate to an equal value with the chattels, *or by taking those chattels*, by an agreement with the next of kin intituled under the statute of distribution, *or even without such agreement*, by appropriating them to herself as her own share. There was no direct proof either of payment of debts by Mrs. Lane, or of any division of the effects, by agreement with the next of kin, or otherwise; and we think that we are not warranted in

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this case in inferring any of these circumstances, from the simple fact of the possession by Mrs. Lane for two years and a half, and the use of the furniture. Her possession, and still more the use of these chattels, is no doubt evidence of title in her own right; and if there was no other proof in the case, would unquestionably be sufficient: but when it appears that the goods were her husband's at his death, and her possession that of an administratrix, it becomes a question upon all the facts, whether she had acquired a title or not in her own right; and we are not satisfied that she did. For any thing that appears in the case, we think the goods would, at the time of the alleged conversion, have been liable to an execution at the suit of a creditor of the husband. A little more evidence might have given a different complexion to the case; but upon the facts in proof, we think we are not warranted in coming to any other conclusion, than that the property remained uncharged; and therefore the rule must be discharged.

Rule discharged.

CLEWORTH v. PICKFORD and Others.

Indebitatus assumpsit for work and labour, and for services in navigating cer-

ASSUMPSIT for work and labour done, and for services in navigating certain barges, &c., for the defendants; with a count for goods sold and delivered.

tain barges for the defendants. Plea, that the claim was for wages due for services performed by the plaintiff as master of a boat used by the defendants for the carriage of goods, they being common carriers, and that the plaintiff was hired by them under an agreement, that, as master of the said boat, he was to be responsible for the safety and due delivery of all goods taken on board by him, and was to be chargeable for all pilferages of, or damage or losses to any goods under his charge; and that the amount thereof should be deducted from his wages, and might be pleaded or set off accordingly. The plea then averred the delivery of a pipe of wine to the plaintiff on board the boat; and that, whilst it was so in the plaintiff's charge, the wine was pilfered and water substituted in lieu thereof, whereby the pipe of wine was greatly damaged, for which damage the defendants were liable, and which damage amounted to a certain sum, &c., which far exceeded the amount of the causes of action in the declaration mentioned. The defendants then claimed to set-off the loss they had thereby sustained, against the plaintiff's demand. To this plea the plaintiff replied de injuriâ:—Held, that the replication was improper.

Semble, that the plea amounted to the general issue.

Plea, that the sum of money in the first count mentioned was and is wages which accrued due to the plaintiff for work and services done and performed by the plaintiff and his servants for the defendants, as a master in the service and employ of the defendants, of a certain boat used by them for the carriage of goods for hire, they being common carriers of goods for hire; and the said sum of money in the second count of the declaration mentioned, was and is the price of certain goods sold and delivered by the plaintiff to the defendants, upon the occasion of his leaving their said employ, and which had been used by him in and about and in respect of the navigation of the same boat, and the horses which drew the same. And the defendants further say, that the plaintiff was hired by them as master of the said boat, under and by virtue of an express contract and agreement theretofore and before the accruing of the said causes of action, to wit, on the 1st of January, 1835, made between the defendants and the plaintiff in that behalf, and which said contract and agreement contained therein certain terms and conditions subject to which the defendants took the plaintiff into their service and employ, and, amongst others, to the following, that is to say; that, as master of the said boat, he was to be fully and absolutely responsible to the defendants for the preservation, safety, and due delivery of all goods taken on board by him, and he was to be charged for all pilferages of, or damages, or losses whatever, to or in respect of any goods then under his charge, by whomsoever committed or sustained, and from whatsoever cause, so as and that the amount of the said pilferages or damages so sustained, although not actually paid by the defendants, were to be deducted from his wages or other demand of his against the defendants, and might be pleaded or set off accordingly. And the defendants further say, that whilst the plaintiff was so in their service and employ under the said contract and agree-

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ment, and upon the terms and conditions contained therein, to wit, on the 5th of February, 1835, a certain pipe of wine of great value, to wit, of the value of £100, was delivered to the defendants as such common carriers, to be carried and conveyed by them from London to Leek, in the county of Derby, and thereupon they, to wit, on the same day and year last aforesaid, caused to be delivered to the plaintiff on board the said boat whereof he was such master as aforesaid, and the plaintiff then received from them, and took under his charge as such master, the said pipe of wine to be carried and conveyed by him in the said boat, upon a part of the passage aforesaid, to wit, to Stoke, in the county of Stafford. And the defendants further say, that whilst the said pipe of wine was so in the possession and under the charge of the plaintiff upon the said part of the said passage as aforesaid, and before it arrived at Stoke aforesaid, certain of the contents of the said pipe of wine, to wit, twenty gallons of the wine therein contained, were pilfered and lost out of the said pipe, and water substituted in lieu thereof, whereby the said pipe of wine was greatly damaged and injured, and for which damage and injury the defendants were by law liable and responsible to the owner of the said pipe of wine. And the defendants further say, that the said damage and loss amounted to a certain sum, to wit, the sum of £50, which far exceeded the amount of the causes of action in the said first and second counts of the said declaration mentioned; and they, the defendants, heretofore and before the commencement of this suit, to wit, on the same day and year last aforesaid, sustained and were obliged to pay money and damages, and sustained losses for and by reason and on account of the said damage and loss to the said pipe of wine as aforesaid, to a large amount, to wit, to the amount of £50; and they, the defendants, have always claimed and do claim to set off and allow to the plaintiff, out of the amount of the said money,

damages, and losses so paid and sustained by them, the amount of the said causes of action in the introductory part of this plea mentioned, in pursuance and according to the said contract and agreement as aforesaid, whereof the plaintiff hath always had notice. Verification.

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To this plea the plaintiff replied *de injuriâ*.

Special demurrer, assigning for causes, amongst other things, that the replication *de injuriâ* is not by law admissible to be pleaded in reply to the said plea, and also for that the said replication is bad for duplicity and multifariousness, in attempting to put in issue the several matters contained in the plea.

The plaintiff's points for argument stated the following, amongst other objections to the plea: viz., "that the agreement therein stated is for the settlement of future causes of action in a manner different from that pointed out by the law, and seeks to controul the jurisdiction of the Courts of law in the decision of such causes of action, and to interfere with the order and method by which, by law, they ought to be decided."

Martin, in support of the demurrer.—It will be said that the plea is not a good plea, because it sets up an agreement which is illegal; but that is not so. It in substance sets forth an agreement that the defendant should be at liberty to set off against the plaintiff's wages or other claim, any loss or damage which they might sustain in respect of any goods which they intrusted to the plaintiff or put under his charge. Before the statutes of set-off, these agreements were very common. *Dobson v. Lockhart* (a) and *Kimmerley v. Hossack* (b) are instances of it. Then the next question is, whether the replication is good, and it is submitted that it is not. It puts in issue the agreement, the delivery of the goods to the

(a) 5 T. R. 133.

(b) 2 Taunt. 170.

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defendants, and the loss of them. A great variety of circumstances stated in the plea are put in issue, instead of the issue being confined to one single point. It is true that in *Selby v. Bardons* (a), a plea in bar to an avowry involving several matters of fact, was held good by *Parke, J.*, and *Patteson, J.*, but Lord *Tenterden* was of a contrary opinion; and *Patteson, J.*, said, that if the question were res integra, he should have had no hesitation in holding that the pleas were bad, on account of the issue tendered by them being multifarious. This plea falls within the exception in *Crogate's case* (b). It is not in excuse, for it claims authority from the plaintiff to set off the defendants' demand; it is in the nature of a set-off; and there is no instance of a replication de injuriâ being held good to a plea of set-off. *Isaac v. Farrar* (c) is the first case in which such a replication was held good in assumpsit, and the other Courts have only so held in conformity with that decision. But there is no case where it has been held to be good even in assumpsit, except in actions on bills of exchange, and this Court appears to have come to the decision in *Isaac v. Farrar*, on the ground that there was a matter in existence at the time of the breach, which constituted a primâ facie case of liability. This is a case of indebitatus assumpsit, and the plaintiff must shew by proof, that a debt was due on a certain day, at which time an excuse existed for its non-payment. In *Crisp v. Griffiths* (d), *Parke, B.* puts the question on that ground: "The plea does not allege that *before* the breach of the defendant's promise, something occurred which took away the plaintiff's right to sue; but that *after* the breach was committed, something was done which suspended that right." It ought to be something which excuses the performance at the time when the act ought to be performed; but this matter of defence had not

(a) 3 B. & Ad. 2.

(b) 8 Rep. 66.

(c) 1 M. & W. 65.

(d) 2 C., M. & R. 164.

occurred at the time the debt accrued. This plea, therefore, alleges matter not of excuse but of discharge, and if so, the replication is bad: *Jones v. Senior* (a). And assuming the plea to be bad, as amounting to the general issue, it has been decided by this Court, that in such a case the replication de injuriâ is improper: *Elwell v. The Grand Junction Railway Company* (b); *Parker v. Riley* (c). And it was also held in the last case that the replication de injuriâ was bad, where the plea amounted to an avoidance of the contract itself. [Lord Abinger, C. B., I doubt whether the plea does not amount to the general issue.] Then as there is no special demurrer to the plea, it will stand, and the replication must be held bad.

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Miller, contra.—The plea confesses a breach of the promise at the time of the action brought, and seeks to excuse it by alleging matter ex post facto. The moment the goods are sold and delivered, the defendants become indebted, and the breach arises, as the law implies a promise to pay on request. Here the loss occurred during the continuance of the plaintiff's service; and the defendants were to be indemnified for losses which they might sustain during the service. The breach of that agreement could not have arisen until the defendants were called upon to pay the damage. The plea admits that the defendants promised to pay for the services of the plaintiff on request, but alleges, that since then they have been called upon to pay damage to a greater amount than what became due for his services. It does not amount to the general issue, because the right of set-off accrued subsequently to the time at which the defendants were in fact indebted to the plaintiff; it is therefore merely an excuse for non-payment. It is only since the new Rules that this replication has been held to be good in assumption.

(a) 4 M. & W. 123.

(b) 5 M. & W. 669.

(c) 3 M. & W. 230.

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Secondly, the plea is bad in substance. There can be no right to set off unliquidated damages. The contract relied upon by the plea is applicable only to the first count, not to the count for goods sold. Again, the agreement is not averred to be in writing. At the time the goods were sold and delivered, the defendants became indebted, and then they say they did not pay for them, because they had this excuse; but it constitutes no excuse at all in law. [Lord Abinger, C. B.—This is not pleaded as a set-off by statute, but by agreement, and if so, it amounts to the general issue.] In order to bring it within that rule, the plea ought to have shewn that the damage had accrued at the time the goods were sold and delivered; but this plea in effect says, at the time the goods were sold, we had nothing to set off, but now we have:—that is not the general issue.—He cited *Noel v. Rich* (a) and *Hemingway v. Hamilton* (b). In the latter case it was held, that if a plea admit an actual breach, it can only amount to an excuse for the non-performance of the contract. Besides, this plea sets up as a defence an agreement which was invalid: for it is clear that a Court of law cannot be ousted of its jurisdiction by an agreement to refer the matter in dispute to the decision of a private tribunal; and the Court will not allow the plaintiff, by such means, to be deprived of the compensation for services to which he is entitled.

Lord ABINGER, C. B.—It appears to me that this plea substantially amounts to the general issue. It states that the plaintiff, by the original contract under which his services were rendered, agreed to accept in satisfaction and payment for the services rendered in the course of his employment, such sum as might be due after deducting any payments which the defendants were liable to make in consequence of his negligence. If that was the contract,

(a) 2 C., M. & R. 360.

(b) 4 M. & W. 115.

it was not a contract which entitled the plaintiff to maintain an action of indebitatus assumpsit for his services; and the plea therefore amounts to the general issue, as it denies that there was any legal contract resulting from the services performed. In all cases of assumpsit, either the circumstances of the case are such as that the law will raise a promise from them, or it arises out of a special agreement. This is a special agreement; and upon the face of the plea it appears, that whether the plaintiff is entitled to be paid for his services, depends upon the question whether, at the time he was entitled to his wages, the money which the defendants had been obliged to pay by reason of his negligence exceeded the amount due to him for services; if it did, then he has agreed that such payments shall go in satisfaction of his demand. That shews that his demand accrues under a special contract, and not by legal inference. If so, the plea amounts to the general issue; and then the replication de injuriâ is bad. With respect to the last point made by Mr. *Miller*, it appears to be entirely a misapplication of the well known rule of law, that an agreement to refer is not binding. It is true that such an agreement is not binding unless it is acted upon, but when the reference has taken place, and the award is made, it becomes so. In one sense it does not oust the Court of its jurisdiction, but in another sense it does; for when the award is made, the jurisdiction of the Courts is gone; and all the Courts have to say is, whether it is a good award or not. The case of an agreement to refer, therefore, does not apply here. But supposing this plea does not amount to the general issue, then it is either a plea of set-off, or a plea of payment in satisfaction; in either of which cases the replication de injuriâ would be equally inadmissible. I am of opinion, however, that it amounts to the general issue.

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ALDERSON, B.—I am of opinion that this plea is either

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equivalent to the general issue, or else is a plea of set-off, which has not been answered by the replication, that being inconsistent with the circumstances stated in the plea. The replication says, that the defendants broke their promise without the excuse mentioned in the plea; but the plea does not offer an excuse for breaking the contract declared on; it says the defendants have not paid the plaintiff, because, under the agreement between them, they have a demand against the plaintiff in respect of the damages sustained by them by reason of his negligence, to a greater amount, which they are willing to set off.

GURNEY, B., and ROLFE, B., concurred.

Leave to amend on payment of costs, otherwise
Judgment for the defendants.

HUNTER v. PARKER and Another.

Seemle, that the master of a ship has authority, when, in consequence of injury to the ship during the voyage, there is no prospect of bringing her to the termination of the voyage, to sell her for the benefit of all parties interested.

TROVER for a ship called the Persian. Pleas, 1st, not guilty; 2ndly, that the plaintiff was not lawfully possessed; and issues thereon.

At the trial before *Gurney*, B., at the London Sittings after Michaelmas Term, 1839, the following appeared to be the facts of the case:—

The ship in question, being then the property of the plaintiff, as the surviving partner of the firm of Hunter and Elliott, who were her registered owners, was stranded,

At all events, where the proceeds of such sale have been received by the owner, that is a sufficient ratification by him of the act of the master in selling her, so as to prevent him from afterwards recovering back the ship from the purchaser or one claiming under him.

So, it is equally a ratification of a sale by an auctioneer, acting under a parol authority from the master.

And where, under such circumstances, the ship was transferred by an instrument executed by the auctioneer, *under seal*, but in other respects complying with the requisitions of the Registry Act, 3 & 4 Will. 4, c. 55, s. 31, it was held, that the ratification of the owner was sufficient to give validity to the transfer; for that, as the statute does not require a transfer *under seal*, the instrument might have the effect of a written transfer by the master according to the statute, as well as that of the deed of the auctioneer.

The purchaser of a vessel under such circumstances cannot set up any defence of *lien* against an action of trover by the owner.

during a heavy gale, on the bar of the harbour of Bathurst, in New Brunswick, on the 11th of November, 1835. The master forthwith called a survey of the vessel, and under the advice of the surveyors caused certain necessary repairs to be done for her immediate safety, and wrote home to the plaintiff for instructions, but received none of any kind. The vessel remained on the strand the whole of the following winter and spring; and in the month of June, 1836, the master called a final survey. The surveyors reported the vessel to be unseaworthy; and, acting upon their report, the master sold her in her then state, by auction, to Mr. Cunard; and the following bill of sale was signed and sealed by the auctioneer:—"Whereas the ship or vessel called the Persian, of the burthen of 257⁵⁰/₆₄ tons, belonging to the port of Sunderland, arrived at the harbour of Bathurst, in New Brunswick, and loaded there a cargo of timber destined for Liverpool, Great Britain; and the said ship or vessel, having her said cargo on board, while riding at anchor in the roads of the said harbour, preparing to proceed to sea on her said voyage, and on the 11th day of November, in the year of our Lord 1835, experienced a heavy gale of wind, which drove her from her said anchorage on the shoals or flats on the north west side of the harbour, where she bilged and struck: That Henry Stratford, the master of the said ship or vessel, caused immediately thereon a survey or examination to be made of the state of the said ship or vessel, and according to the report or recommendation of the surveyors, the said Henry Stratford, master as aforesaid, and acting as the agent for the owners, underwriters, and all others concerned in the said ship or vessel, caused certain things to be done and performed for the safety and preservation of the said vessel, with her cargo: That on the 2nd day of June next following, which was in the present year of our Lord 1836, the said ship or vessel being still on the flats or shoals aforesaid, and having experienced additional damage

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by the ice during the intervening winter, the said Henry Stratford caused another and final survey to be held on the said vessel by competent persons, and according to the custom of the country, the result of which survey was the condemnation of the said ship or vessel as unseaworthy, &c.; all of which has been made to appear unto me, as well by the protest of the said Henry Stratford, as by the testimony of the surveyors and otherwise; whereupon the said Henry Stratford, acting as aforesaid, applied to, directed, and authorized me, Henry W. Baldwin, an auctioneer, duly licensed and qualified, to advertise for sale, and to sell for the best advantage, for the benefit of owners, underwriters, insurers, and all others whomsoever interested in the said vessel, the hull, masts, spars, rigging, boats, and furniture of or belonging to the said ship or vessel; and, accordingly, at Bathurst aforesaid, on the 15th day of June, 1836, after sufficient notice being published and generally made known of the same, the said ship or vessel and furniture as aforesaid, were offered and exposed by me for sale at public auction; and the hull being then and there set up, Henry Cunard, of the firm of Cunard & Co., of Bathurst aforesaid, appearing the highest bidder, therefore it was accordingly to the said Henry Cunard knocked down and sold: Therefore, know all men by these presents, that I, Henry W. Baldwin, a licensed auctioneer for the county of Gloucester, acting under and by the authority aforesaid, and for and in consideration of the sum of £280, lawful money of New Brunswick, to me in hand well and truly paid by the said Henry Cunard, of the firm of Joseph Cunard & Co., the receipt whereof I do hereby acknowledge, for the uses and purposes aforesaid, have granted, bargained, sold, assigned, transferred, and set over, and by these presents, do fully and absolutely grant, bargain, sell, assign, transfer, and set over unto the said Henry Cunard, his executors, administrators, and assigns for ever, all that ship or vessel called the *Persian*, of 257 tons' burthen,

or thereabouts, now lying stranded on the shoals on the north side of Alston Point, at the mouth of the harbour of Bathurst aforesaid, with the lower masts, bowsprit, windlass, and all furniture remaining on board at the date of these presents, which said ship or vessel had been duly registered pursuant to an act of Parliament for that purpose, and a copy of the certificate of registry is as follows, viz. [the certificate of registry was then recited]:—

To have and to hold the said ship or vessel called the Persian, and all and singular the premises hereinbefore mentioned, and hereby bargained and sold, or intended so to be, and every part and parcel thereof, with the appurtenances, unto the said Henry Cunard, his executors, administrators, and assigns, to and for his and their own proper use and benefit, and as their own proper goods and chattels, henceforth for ever: and I, Henry W. Baldwin, do covenant and agree to and with the said Henry Cunard, his executors, administrators, and assigns, in manner following, that is to say, that I have in myself, by the authority and for the purposes hereinbefore named, and by and for none other, full power and absolute authority to grant, bargain, sell, transfer, and set over the said ship or vessel called the Persian, with the appurtenances, unto the said Henry Cunard, his executors, administrators, and assigns, in manner and form aforesaid, according to the true intent and meaning of these presents. In witness" &c.

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The auctioneer had no authority for the sale, except a letter from the master directing it. Cunard, the purchaser, paid part of the purchase-money to the master for necessary expenses, and the balance was transmitted by him to his agent in England, by whom it was paid over to the plaintiff. Cunard got the vessel off the shoals with great difficulty; and having been at considerable expense in fitting her for sea, sent her with a cargo to England, where

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he offered her again to the plaintiff for the money he had expended upon her, but which the plaintiff refused to give, saying, that she was not worth so much; that she had been fairly sold and bought, and he was sorry Mr. Cunard had made a bad bargain. Cunard afterwards entered into a negotiation for the sale of her to a Mr. Briggs, to which negotiation the plaintiff was a party, and told Briggs that if he bought her, he (the plaintiff) would not interfere. Briggs did buy her, and subsequently resold her to the present defendants, and the plaintiff supplied her with stores on their credit. The plaintiff, notwithstanding, afterwards demanded the vessel back from the defendants; and on their refusal to deliver her, brought this action of trover against them to recover her.

The learned Judge, in summing up, left three questions to the jury:—First, whether the master, in selling the ship, had acted *bonâ fide*, and with the intention of doing the best for the advantage of the owner and of all parties concerned. The jury found that he had. Secondly, whether there was an actual necessity for the sale. The jury found that there was. Thirdly, whether the plaintiff had, by his subsequent conduct, ratified the acts of the master with knowledge of them. The jury found that he had. The verdict was thereupon, under his Lordship's direction, entered generally for the defendants.

In Hilary Term, 1840, *Cresswell* obtained a rule nisi for a new trial, on the ground of misdirection. He made the following points:—First, that the master of a vessel has not, under any circumstances, authority to sell her so long as she continues a ship, but can sell a mere wreck only, which it was clear this vessel was not: *Reid v. Darby* (a); secondly, that even if the master had such power of sale, he could not delegate it to the auctioneer:

(a) 10 East, 143.

thirdly, that the bill of sale being by deed, and not being executed as the deed of the principal (the master), was therefore void under the Ships' Registry Act, 3 & 4 Will. 4, c. 55: fourthly, that there was no proof of any ratification, or of any knowledge, by the plaintiff of the form of the sale, although there was of the sale itself: and lastly, that no *lien* existed in the defendants, and therefore there was no defence to the action, if the property in the ship was in the plaintiff at the time of the demand and refusal. In Easter Term,

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Sir *W. W. Follett* and *R. V. Richards* shewed cause against the rule.—Upon the evidence and the finding of the jury in this case, the plaintiff clearly was not entitled to recover this vessel in an action of trover against the defendants. It was found by the jury, and is now to be taken as a fact in the cause, that this ship being wrecked, and lying on the strand of New Brunswick in such a state that it became a matter of necessity to sell her as a stranded vessel and a wreck, the master in so selling her acted with perfect bona fides, and for the advantage of all parties: and it is further found that every thing which he did, received the sanction and ratification of the plaintiff, with full knowledge of the circumstances. More than this, it appeared that the purchase-money of the wreck was paid to and received by the plaintiff himself; that the defendants were bonâ fide purchasers of the vessel, when repaired, with the plaintiff's knowledge and sanction, and that part of her fittings-up and furniture, as she now is, were supplied to the defendants by, and paid for to, the plaintiff himself. It would be a strange state of the law if the plaintiff, under such circumstances, could recover the vessel back in trover from these defendants. But it is said that the sale by the master was void, because the Registry Act has not been complied with. It is submitted,

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however, in the first place, that that statute does not apply at all to such a case as the present; and next, that if it does, it has been sufficiently complied with.

First, this is a case of *necessity*, in which the law permits the master to dispose of the vessel *as his own*, he acting *bonâ fide*. The law on this subject was certainly otherwise at one time; and in *Reid v. Darby (a)*, a sale by the master, under the order of a Vice Admiralty Court, of a vessel which had been reported by surveyors to be unfit to proceed with her cargo, and that the expense of repairing her would be more than her value when repaired, was held to be void for want of a compliance with the forms prescribed by the Registry Acts. But subsequent cases have clearly established that the master is justified in selling the ship under circumstances like the present, and the objection as to the Registry Act occurs no where but in *Reid v. Darby*: see *Cambridge v. Anderton (b)*, *Robertson v. Clark (c)*, *Hayman v. Moulton (d)*. It is an important question, whether an act of Parliament, passed for public purposes connected with the employment of shipping, is to apply to the case of a sale, under an absolute necessity, of a stranded or wrecked vessel, where she is sold, not by the owners, as a ship for use, but by the master as their agent under the peculiar circumstances. In *Cambridge v. Anderton*, the argument was used that the ship in that case was *not* a wreck, because she was sold as a ship, with her certificate of registry: upon which *Abbott, C. J.*, observes—“The master had no power to sell the register.” In the case of *The Gratitude (e)*, where it was held that the master may, under circumstances of urgent necessity, *hypothesize* the ship, Lord *Stowell*, adverting to the paucity of authorities on the subject, says—“The law of cases of necessity

(a) 10 East, 143.

(c) 1 Bing. 445; 8 Moore, 622.

(b) 2 B. & Cr. 691; 4 D. & R.

(d) 5 Esp. 65.

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(e) 3 Rob. Adm. R. 240.

is not well furnished with precise rules; *necessity creates the law*, it supersedes rules; and whatever is reasonable and just in such cases, is likewise legal." Applying that principle here, are you to extend to this case of strict necessity the rules which govern the sale of British ships, as such, for the purpose of being used? It is true, the wreck *may*, by expending a large sum upon it, be converted again into a vessel fit for sea, and used; but it is not sold *as a ship*, but as a wreck. By the 8th section of the Registry Act, 3 & 4 Will. 4, c. 55, it is enacted, that if any ship or vessel registered under the authority of the act shall be deemed or declared to be stranded or unseaworthy, and incapable of being recovered, or repaired to the advantage of the owners, and shall for such reasons be sold by order or decree of any competent Court, for the benefit of the owners, the same shall be taken and deemed to be a ship or vessel *lost or broken up*, within the meaning of the act, and shall never again be entitled to the privileges of a British-built ship, for any purposes of any trade or navigation. It appears somewhat strange that the order or decree of a Court should be required in such a case, since that cannot make the necessity the greater. But this enactment assumes that the provisions of the act are not to be complied with, and yet that the *property passes* by the sale. How, then, can the original owner resume possession of her after such sale? what can he do with her? She will not be more entitled to the privileges of a British-built ship in the hands of the party who has thus sold her, than in those of the vendee. But the case of *Reid v. Darby*, on which the plaintiff relies, even supposing it to be maintainable, is distinguishable from the present. In the first place, it arose under the stat. 84 Geo. 3, c. 68, the provisions of which differ materially from those of the 3 & 4 Will. 4, c. 55. In the next place, the facts were very different. There the ship was re-

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ported to be unfit to proceed with her cargo, but that she was repairable for that purpose at an expense exceeding her value when repaired. But further, the owner there had done nothing to ratify the sale, still less had he received any part of the proceeds. If, however, the case be quoted as an authority that in all cases of sale by the master of a disabled ship, the forms of the Registry Act must be complied with, it is submitted that to that extent it is not maintainable in point of law; and that if by reason of the necessity the master had a right to sell, he had a right to do all that was necessary towards completing the transfer. [*Parke, B.*, referred to *Barr v. Gibson (a)*.] That case does not appear to be very applicable to the present. Suppose, in this case, instead of repairing the vessel, *Cunard* had broken her up, could the plaintiff have recovered the materials in trover? Or suppose the case of a vessel actually sunk, and in that state sold, and afterwards raised up and converted again into a ship, would she be within the provisions of the Registry Act? The question is, what she is *at the time of the sale*; if then a mere wreck, the subsequent conversion of her into a ship can make no difference.

But, secondly, the Registry Act was in fact complied with here. The 31st section enacts, that when and so often as the property in any ship or vessel, or any part thereof, belonging to any of his Majesty's subjects, shall, after registry thereof, be sold to any other or others of his Majesty's subjects, the same shall be transferred by bill of sale *or other instrument in writing*, containing a recital of the certificate of registry, &c., otherwise such transfer shall not be valid or effectual for any purpose whatever, either at law or in equity. This section does not require a *deed*; nor is the instrument required to be signed by the vendor

(a) 3 M. & W. 390.

or by the owner; it may therefore be executed by an agent: nor are any particular contents required in it, except a recital of the certificate of registry, which the bill of sale in this case did contain. It is said, however, that the master, if any, was the agent of the owner, and not the auctioneer; but the auctioneer acted under a written authority from the master. It is objected, indeed, that the master could not so delegate his authority; or that, at all events, the authority to execute an instrument under seal must itself be under seal. But the seal is not made necessary by the act; and if the auctioneer had authority to execute a written transfer, his putting a seal upon it unnecessarily would not avoid his authority. [*Parke, B.*—According to *Barr v. Gibson*, no action of covenant would have lain on an implied warranty that this was a ship, against any body but the auctioneer.] Where a party authorizes another to execute an instrument for him, if a seal be not necessary it is binding, although a seal be not affixed to it. In *White v. Cuyler (a)*, it was held that if a feme coverte, without any authority from her husband, contract with a servant by deed, the servant, having performed the services stipulated for, may maintain assumpsit against the husband. In *Brutton v. Burton & Mills (b)*, it was held that a warrant of attorney under seal, executed by one person for himself and his partner, in the absence of the latter, but with his consent, was a sufficient authority for signing a judgment against both. That proceeded on the ground that the warrant of attorney need not be under seal, for one partner cannot bind the other partners by deed: *Harrison v. Jackson (c)*; and also upon the ground, which is no less applicable to the present case, that after the warrant of attorney was given, the defendant Burton

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(a) 6 T. R. 176.

(b) 1 Chitty's Rep. 707.

(c) 7 T. R. 207.

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had frequently admitted its validity. That case appears to be directly in point, and it is referred to in Collyer on Partnership, 261, where the reason for the judgment is stated to be, that the warrant of attorney to confess judgment need not be under seal. In Sugden on Powers (a), it is said, "Where a power is given generally, without defining the mode in which it must be executed, it may be exercised either by deed or will;" and the author adds, "nor is it necessary that the power should be executed by deed; a simple note in writing, even unattested, would be a good execution of the power." It might perhaps be said that the owner would not be liable in covenant on the deed; but at all events he was bound by the transfer of the ship, which is not rendered invalid by affixing a seal to it. Suppose the owner of a vessel gives authority in writing to an agent to transfer the vessel, and he sells it, and draws up the transfer, and afterwards puts his seal to it, can it be said that that would render it void? It is surely valid as a transfer in writing. It may be said that money had and received would lie to recover back the purchase-money, but that is at least doubtful. Where a party keeps a chattel, he cannot rescind the contract. This case is not distinguishable from that of an award, where there is no authority to execute it by an instrument under seal; and it is put by Sir *Edward Sugden*, in his Treatise on Powers (b), that the arbitrator has power to execute it by an instrument under seal. But, at all events, the subsequent ratification by the plaintiff forms a sufficient answer to the objections, both as to the authority of the auctioneer to sell at all, and as to the form of the transfer. He has adopted and ratified the authority of the auctioneer, by acting under the instrument executed by him, just as much as if he had beforehand ex-

(a) Vol. 1, p. 260, 6th edition.

(b) Id.

pressly and formally authorized the execution of it under seal: *Macleay v. Dunn* (a). His acts amount to a complete and binding admission that all the requisites to a good transfer have been complied with. This is, therefore, an instrument in the form required by the statute, executed by an agent whom the plaintiff is precluded from treating as having acted without authority. The stat. 34 Geo. 3, c. 68, required the instrument to be signed by the owner. But, further, even if the instrument be not in itself a valid transfer of the plaintiff's interest in the ship, it may operate as an *agreement* to give possession, and to execute a valid transfer afterwards; and if possession be given accordingly, the vendor surely cannot recover back the vessel in trover. In *Beed v. Blandford* (b), where the master and part-owner of a vessel agreed to purchase the moiety of his partner, and having paid the purchase-money and received the title-deeds, which he deposited as a security with a third person, had the entire possession of the vessel given up to him, but his partner afterwards refused to execute a bill of sale, or refund the money: it was held, that an action for money had and received would not lie to recover the purchase-money, as the parties could not be restored to their original situation. That is an authority, that after the intended purchaser has had possession of and used the vessel, and the parties cannot be put into their original situation, the original owner is not entitled to recover. It is submitted, however, that the Registry Act has, in this case, been strictly complied with.

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Cresswell and *W. H. Watson*, contra.—The plaintiff is entitled to recover. He was the owner of this vessel, and unless the regulations imposed by the Registry Act have

(a) 4 Bing. 722.

(b) 2 Y. & J. 278.

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been complied with, it is still his property, and he must be entitled to recover, unless the defendant has some right to retain her on the ground of lien. The facts of the case are, that this ship being stranded in a foreign port, the master, not having express authority to sell her, authorizes the auctioneer to do so, and assumes to give him all the implied authority which he had himself; the auctioneer does accordingly sell her, and executed a bill of sale which, by its very terms, is an instrument under seal: he does affix a seal to it, and introduces into it covenants that he has full power and authority to sell the vessel. *Reid v. Darby* (a) is directly in point to shew that the master had no original authority to sell the ship under these circumstances, when she was capable of being repaired, and the voyage continued, as the event shewed; but, supposing he had such authority in a case of necessity, that still the vessel, subsisting as such, and capable of being used for the purposes of navigation, and being so used in fact after repair on the spot, could only be conveyed by the master in the form prescribed by the Registry Act: and the requisites of that act were in no way complied with in the present case. There it was urged in the argument, that the Registry Act did not apply to a sale of necessity: but Lord *Ellenborough* says—"It is not found that the ship was not navigable, but only that she was not capable of being navigated home with her then cargo;" and *Le Blanc, J.*, says, "While the subject-matter remains in the form of a ship, though wanting repairs, which perhaps it might not be worth the owner's while to make, would not the provisions of the Register Acts continue to apply to it, if it were in a British port?" And Lord *Ellenborough* adds, "Must we not consider, under the Register Acts, whether the vessel were sold as a ship capable of repair, or as a m

(a) 10 East, 143.

wreck?" Now here this vessel was certainly sold as a ship, and those observations strictly apply to shew that she could not be legally sold as such, without a due compliance with the Registry Act. But it is said, that after the vessel arrived in England, the plaintiff recognised the sale, and sold to and supplied the ship with stores. But circumstances of that nature cannot be an answer to the objection that the express provisions of an act of Parliament have not been complied with. It is said, indeed, that there was no necessity for any bill of sale under the circumstances of this case. The master, however, has no authority to sell a vessel as long as she continues a ship, under any circumstances. His authority is limited to the command of the ship. When it becomes a wreck, and the boards and planks of the ship are cast afloat, it is admitted that he may sell the materials of which she was composed. *Cambridge v. Anderton* (a) has no bearing on the present case. It was there held, that on a contract of indemnity on a policy of insurance, where, by means of one of the perils insured against, the ship, the subject of insurance, ceased to retain the character of a ship, and was, properly speaking, a wreck, the assured were entitled to recover as for a total loss. There the ship was abandoned, and there was a total loss, and consequently the owner would be entitled to recover. But those cases of policies have no bearing on the present question. According to the decision in *Barr v. Gibson* (b), this vessel did continue to be capable of being transferred as a ship at the time of the conveyance, though she might be totally lost within the meaning of a contract of insurance. If she so far retained the character of a ship as to be capable of being sold as such, she is within the Ships' Registry Act. The case of *The Grati-*

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(a) 2 B. & C. 691; 4 D. & R. 203.

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dine (a) has been cited, where it was held that a master may hypothecate the ship or cargo for repairs in a foreign port, such repairs being necessary for the prosecution of his voyage: but it has been held that he cannot *sell* the ship and cargo. If he sells the ship, he destroys the object of the voyage. In *Freeman v. The East India Company* (b), it was held that the captain of a ship has no right to sell the ship except in the case of an absolute necessity; and, the jury having found that there was no absolute necessity for the sale, that the purchaser acquired no title, and the original owners were entitled to recover its value. There are several authorities to shew that a master cannot sell the ship, though he may hypothecate her, and they do not appear ever to have been overruled:—*Johnson v. Shippen* (c), *Hayman v. Moulton* (d). Here the defendants have proved this to be a ship, because it was capable of being got off. If the jury have found her to be a ship, the captain had no authority to sell, and the property does not pass; if she was not a ship, then it does. In *Barr v. Gibson*, this Court draws the distinction between what is to be considered as a ship for the purposes of navigation, and what amounts to a total loss. “True, the subject of the transfer had the form of a ship, although on shore, with the possibility, though not the probability, of being got off. She was still *a ship*, though at the time incapable of being, from the want of local conveniences and facilities, beneficially employed as such.” Then the defendants have proved that this was not only a ship, but capable of being got off and repaired. *Reid v. Darby* shews, first, that the master has no authority under such circumstances to sell the ship; but, secondly, that if it were a case of necessity, and that he had authority on that ground to sell her, he

(a) 3 Rob. Adm. Rep. 240.

(b) 5 B. & Ald. 617.

(c) 2 Ld. Raym. 982.

(d) 5 Esp. 65: more fully stated and observed upon in Abbott on Shipping, 8, 9, 10, 3rd Ed.

must do so in the form prescribed by the Registry Act. With respect to the supposed ratification of the contract after the ship's arrival in England, there is no pretence for saying that the plaintiff ever knew of the mode in which she had been transferred. And even if it be assumed that the captain had authority to sell, he could not transfer that authority to the auctioneer. In Roll. Abr. tit. Authority, C., it is said—"An executor having authority to sell cannot sell by attorney. Co. 9, Combe, 77 b." And in 2 Roll. Abr. tit. Feoffment, R. pl. 13,— "An attorney cannot make a letter of attorney to another to make binding." But even supposing that the authority could be delegated to the auctioneer; yet, inasmuch as the act done by him was by a deed under seal, there must have been an authority under seal to enable him to do so. Although a parol authority may be sufficient to authorize the execution of a written instrument, it is not so when the instrument is under seal. In *Harrison v. Jackson* (a), it was held that one partner cannot bind the other partners by deed. *Horsley v. Rush* (b), there cited, was an action of covenant on a charterparty, to which the defendants pleaded the general issue: and it appearing that the deed was executed by "G. Dwyer, by order and for account of Messrs. Rush and Tolson," but that Dwyer had only a verbal authority from the defendants to execute the charterparty, Lord *Kenyon* held, that the action could not be maintained; for that a deed could not be executed by an agent, so as to bind the principal, unless he were authorized by deed under seal; and that though one partner might bind another by written instruments, he could not do so by deed, without a special power under seal for that purpose. But it is said, that though this contract was executed by an instrument under seal, it was still good as a simple transfer in writing, which

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(a) 7 T. R. 207.

(b) Guildhall Sittings after Michaelmas Term, 1788.

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It is not necessary that a seal be affixed to render a deed valid. The cases cited for the indorsement were cases where the nature of the instrument was not altered by the affixing of a seal. In the case of an indenture or of a will, it is neither more nor less than an indenture or a will, because it is under seal; that does not alter the nature of it. Besides, in the case of an indenture the action would be on the submission or the agreement in writing. But if I authorize a party to sign an indenture in reference for me, and he executes a deed in a deed, I am not bound by it. Sugden on Powers has been cited to show that where a power is given generally, without defining the mode in which it is to be executed, it is not necessary that it should be executed by deed, but that a simple note in writing is sufficient; but what instrument is it that operates in those cases? Clearly, the instrument creating the power, so that it be in writing. There must be the authority being given by a deed, there is an authority to execute by a deed. Even if the master was here substituted for the owner, and assuming he had by law authority to sell the ship, he had no right to delegate that authority to the auctioneer, to enter into a contract under seal in his own name; and here the auctioneer covenants in his own name. In *Combe's case* it was resolved, secondly, "That when any one hath authority, as attorney, to do anything, he ought to do it in his name who giveth the authority; for he appointeth the attorney to be in his place and to represent his person, and therefore the attorney cannot do it in his own name, nor as his own act, but in the name and as the act of him who giveth the authority." The same principle is laid in *D'Aboidgcourt v. Ashley* (b). The decisions on this subject were reviewed and recognised in *Berkeley v. Hardy* (c). There an indenture was made between "A. for and on behalf of B. on the

(a) 9 Rep. 76, b.

(b) Moor, 313.

(c) 5 B. & Cr. 355; 8 D. & N. 109.

one part, and C. on the other part," A. being thereunto authorized by writing under B.'s hand, but not under seal; and A. executed the deed in his own name; it was held that B. could not maintain covenant on the deed, although the covenants were expressed to be made by C. to and with B.

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Lastly, trover is maintainable in this case. Supposing this to be a contract to sell the mere chattel, but not carried into effect in compliance with the Registry Act, the legal title to it would remain in the original owner, although a Court of Equity would have compelled the transfer. Unless the provisions of the Registry Act are complied with, no property passes by the bill of sale out of the owner. Nor could the defendants acquire any lien for salvage, or for money expended under such circumstances. In *Sutton v. Buck (a)*, it was held that the lord of a manor is not entitled to salvage, for taking against the consent of the owner, and preserving, parts of a ship thrown on his manor, when the servants of the owner are there to take care of it for him. That is also an authority upon the former point. The plaintiff there bought and paid for a ship stranded on the English coast, but the transfer was not regular; he tried to save her, but she went to pieces: the defendant possessed himself of parts of the wreck, which drifted on his farm; and it was held, that the plaintiff's possession enabled him to recover them in *trover*. This is the case of a ship which was the property of the plaintiff, but which has been sold without his authority; and even if the master had authority under the circumstances to sell her, he could not delegate that authority to another.

The plaintiff is therefore entitled to maintain trover to recover her from the defendant.

The judge

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PARKE, B.—Upon the argument of the motion for a new trial in this case, which was an action of trover for the ship “Persian,” several points were made, which, on account of their importance, were thought worthy of further consideration; and the judgment of the Court has, accordingly, been delayed for some time.

The facts were, that the ship “Persian” was the property of the plaintiff; she was stranded on the coast of New Brunswick, in the autumn of 1835, and remained on the strand for the whole of the winter. The captain wrote home to his owner, the plaintiff, for instructions, and could get none; and in the month of June 1836 a survey was called, and it was thought best to sell the ship in the state in which she was. She was accordingly sold by auction to Mr. Cunard; and a bill of sale was signed and sealed by the auctioneer, of which the following is the substance: [His Lordship then stated the bill of sale, as ante, p. 323.] The only authority which the auctioneer had for that bill of sale, was a letter from the captain. After the sale, the balance of the purchase-money was received by the plaintiff from Cunard’s agent in England. Cunard got her off with difficulty; and at a great expense fitted her for sea, and sent her to England. He offered her to the plaintiff for the money she had cost him, but the plaintiff would not give it, saying “that she was not worth so much; that she had been fairly sold and bought; and he was sorry Cunard had made a bad bargain.” The plaintiff was afterwards a party to a negotiation for selling her to another person: he told that person, if he bought, he would not *interfere*: he did buy; and the vessel was finally sold by him to the defendants. The plaintiff afterwards supplied her with stores on the defendants’ credit. After that, the plaintiff made his demand upon the defendants, and the defendants refused to deliver her up.

My Brother *Gurney* left three questions to the jury:—1st, whether the captain acted *bonâ fide*; and whether he

did the best for the advantage of the owner. The jury found that he did. Secondly, whether there was a necessity for the sale. The jury found that there was. Thirdly, whether the plaintiff had ratified the sale with knowledge. The jury found that he had; and a verdict was entered for the defendants.

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The plaintiff's counsel moved for a new trial: a rule nisi was granted; and, on the argument, they rested his right to recover on these grounds: 1st, that the master of a ship has *under no circumstances* the power of selling her, if she continue a ship—that he can sell a mere wreck only, which this vessel was not: and that the necessity for the sale, found by the jury, will not justify it. Secondly, that, if the master had a power of sale, he could not delegate it to the auctioneer. Thirdly, that the bill of sale by the auctioneer, being by deed, was not executed as *the deed* of the principal, and was void. Fourthly, that there was no ratification by the principal in this case of the form of the sale, though there was of the sale itself; for there was no proof of any knowledge by the principal, and he could not ratify what he did not know. Fifthly, that a lien in this case on the part of the defendant did not exist, and that there was no defence to the action of trover, if the property was in the plaintiff at the time of the conversion.

The Court have had no difficulty in this case, except that which arises from the form of the bill of sale, that is, its being an instrument under seal.

They intimated in the course of the argument, that there could be no defence on the ground of lien; and that if the property was in the plaintiff when the refusal took place, the plaintiff must recover. The question then is, whether the property did pass by the bill of sale. As to the objection, that the master himself had no authority to sell, it is unnecessary to pronounce any opinion: though the Court do not mean to intimate that the mas-

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ter has not such a power, in a case of actual necessity, notwithstanding the case of *Reid v. Darby* (a), in which the point was judicially decided; for it appears by subsequent authorities, that the master has, by virtue of his employment, not merely those powers which are necessary for the navigation of the ship, and the conduct of the adventure to a safe termination, but also a power, when such termination becomes hopeless, and no prospect remains of bringing the vessel home, to do the best for all concerned, and therefore to dispose of her for their benefit. It is a case of necessity, when nothing better can be done for the benefit of the master's employers; and that necessity is found to have existed in this case. But here, after the sale, the plaintiff not only expressed his approval of it, but actually received the balance of the purchase-money from the agents of Mr. Cunard, the vendee; which is clearly a ratification of the sale, and prevents any question as to the authority of the master to make it. But then it is said, that the plaintiff did not know the mode of sale; neither that it was effected by the captain's substitute, the auctioneer, nor that it was made by an irregular instrument. The jury found that the sale was ratified with knowledge, but perhaps there was not sufficient proof of knowledge of all the particulars of the sale. In our opinion, however, this is not material; for as the plaintiff received the balance of the purchase-money from the vendee's agent without objection, and thereby induced him to suppose the sale to have been regularly made with his consent, and to part with the price, he must be taken either to have known and approved of the mode of sale, or to have waived all objection to it; the conduct of the plaintiff amounted therefore to a ratification of every thing that could be ratified by parol; and therefore sanctioned the delegation of authority to the auctioneer, and the sale

(a) 10 East, 143.

by him; and put the vendee in the same situation as if the plaintiff had expressly directed the sale to be made in the form in which it was made. But neither a parol ratification nor a parol authority could have the effect of giving power to the auctioneer to execute a *deed* for the plaintiff, or to make the bill of sale *his deed*: such a power could be given by an instrument under seal only; and must be executed in the name, and as the act and deed of him who gave the power; for a power of attorney *transfers* no interest: the attorney is merely thereby put in place of the principal, and represents his person, and his own act could convey nothing: *Combe's case* (a). If one have power by letter of attorney to make leases for years by indenture, the attorney ought to make them in the name and style of his master; Bac. Abr. Leases (J.), s. 10. And this holds in regard to all solemn instruments under seal: and if an instrument under seal were necessary in this case, there was neither the requisite authority nor the proper form of conveyance, to make it a valid act. But the statute 3 & 4 Will. 4, c. 55, s. 31, does not necessarily require a bill of sale—an instrument in writing reciting the certificate of registry, is enough; nor does it require such instrument to bear the signature of the party conveying: and if there had been no seal to this instrument, which does contain such a recital, it would have been sufficient; for when a contract may be made by any species of written instrument, the same strictness is not required as in formal instruments under seal. The sale of merchandize above the value of £10 might be made by an agent, by note in writing, describing him as such, though not signed by the agent for the principal, or even without referring to his character of agent at all; and a ship may be transferred by a document as informal, provided always, in the case of a British ship, that the certificate of regis-

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(a) 9 Rep. 75, 77.

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try is duly recited. The instrument, therefore, would have been unquestionably valid, if there had been no seal. The whole difficulty in the case arises from that circumstance. The addition of the seal has the effect of causing the auctioneer to be liable to an action of covenant on his express covenant; and the instrument is unquestionably his deed, and is not the deed of the principal; nor could it ever have been: but it is still a *writing*: it purports to convey, not any interest from the agent himself, but such as he is empowered to convey: and as we assume it to have been made with the authority of the principal, and by his direction, and to have been so made in this form (in consequence of the subsequent ratification), we think we may, consistently with the established rules of law, give it the effect of a written transfer of the ship by the principal, as well as that of the deed of the agent.

The authorities relied upon by the plaintiff are distinguishable. *Moor*, 818, was the case of a release, which must be under seal, and unless it be, the release of the principal is void. In *Berkeley v. Hardy*, the point decided was, that where an agent authorized by writing, but not under seal, demised by indenture, the principal, who was no party to the indenture, could not maintain an action upon it: it was not decided that no interest passed to the lessee. On the other hand, there is no case precisely in point in favour of the defendant. In *White v. Cuyler*, the deed of a feme covert had no operation at all as against her; it was merely void, and being adopted by the husband, became his agreement alone. In *Brutton v. Burton & Mills*, a warrant of attorney for two partners, executed by one for both, was held to bind both; one as his deed, and the other by subsequent ratification, not as a deed, but an instrument of consent. In that case the instrument purported to be the act of two partners, and effect was given to it as such, as far as the case permitted. The present case bears some analogy to the last. It is the deed of the auc-

tioner, but it also may operate, by the consent of the principal, as a written transfer from him, as it certainly would have done if there had been no seal to it; and in order to prevent the instrument from failing in its effect, and ut res magis valeat quam pereat, we do not feel ourselves precluded from holding that it operates to transfer an interest. If the authority had been by deed to convey by deed, the instrument would have been clearly inoperative for that purpose; but the authority is by parol; and must be assumed to have been to convey in the form in which it was conveyed: and this we think may be supported.

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Rule discharged.

END OF MICHAELMAS TERM.

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Exchequer,

AND

Exchequer Chamber.

HILARY TERM, 4 VICTORIÆ.

REGULA GENERALIS.

IT is ordered, that a party entitled to appear to a declaration in ejectment, may appear and plead thereto at any time after service of such declaration, and before the end of the fourth day after the term in which the tenant is required by the notice to appear; and may proceed to compel the plaintiff to reply thereto, or may sign judgment of non-pros., notwithstanding such plaintiff may not have obtained a rule for judgment on such service of declaration: and that a plaintiff who may have omitted to obtain a rule for judgment within the time prescribed by the present rules and practice, shall be entitled, on production of such plea, to an order of a Judge for leave to draw up a rule for judgment, as of the time at which such rule for judgment should have been obtained.

(Signed by all the Judges.)

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GILLETT v. GREEN.

Jan. 12.

WHATELEY moved for a rule, calling upon the defendant to shew cause why the Master should not tax the plaintiff his treble costs, pursuant to the stat. 5 & 6 Will. 4, c. 83, s. 3. This was an action on the case for the infringement of a patent; and the affidavit stated, that a prior action had been tried between the same parties, in which the plaintiff obtained a verdict, and the Judge certified under the above statute, that the validity of the patent came in question before him. This certificate was given in evidence for the plaintiff on the trial of the present action, which was tried before Lord Abinger, C. B., on the 13th of July, 1840, when the plaintiff again obtained a verdict for nominal damages. Ten days before the trial (3rd July, 1840), the 3 & 4 Vict. c. 24, came into operation; but no application was made to the Lord Chief Baron at the trial to certify, under that statute, that the action was brought to try a right. The Master refused to tax the plaintiff treble costs under the 5 & 6 Will. 4, c. 83, s. 3, on the ground that the case fell within the provisions of the 3 & 4 Vict. c. 24, s. 2.—*Whateley* now contended that the latter act could not have been intended to affect the right to treble costs under the 5 & 6 Will. 4, c. 83; and further, that it did not apply to cases where it appeared by the pleadings in the cause that a *bonâ fide* right came in question. At all events, he urged that the Lord Chief Baron might now grant a certificate under the 3 & 4 Will. 4, c. 24. In *Shuttleworth v. Cocker* (a), the Court of Common Pleas held that a Judge might alter his certificate granted under that act, after the trial.

An action on the case for the infringement of a patent, is within the operation of the 3 & 4 Vict. c. 24, s. 2; and notwithstanding the provisions of the stat. 5 & 6 Will. 4, c. 83, s. 3, the plaintiff, recovering only nominal damages, cannot have his full costs, or treble costs, without a certificate under the former act.

And the Court held, that, after the taxation, the Judge had no power to grant such certificate.

PARKER, B.—If we entertained any doubt on this matter,

(a) 9 Dowl. P. C. 76.

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we should think it right to grant a rule to shew cause; but we do not. This is certainly an unfortunate case; but it is clear that it falls within the act of 3 & 4 Vict., which applies to "any action of trespass on the case." Then it is said the Lord Chief Baron has still the power of certifying; but that is not so: the statute expressly directs that the plaintiff shall not recover costs where the damages are under 40s., unless the Judge "shall *immediately afterwards* certify" that the action was brought to try a right, &c. It may even be a question whether the Judge could grant the certificate after another cause had been called on (a).

ALDERSON, B., GURNEY, B., and ROLFE, B., concurred.

Rule refused.

(a) See however *Thompson v. Gibson*, post, Vol. 8.

HOLFORD v. DUNNETT.

Jan. 13.

The first count of a declaration was framed upon an agreement whereby the plaintiff agreed to let, and the defendant agreed to take, certain premises, subject to conditions therein specified, and where-

by it was agreed that the defendant should keep the windows and all other parts of the premises, except the roof and main timbers, and the outside, in effectual repair: and alleged as a breach, that he permitted them to be out of repair. The second count stated, that in consideration that the defendant had become and was tenant to the plaintiff of a *certain other* messuage and premises, the defendant promised to use them in a tenant-like and proper manner; and alleged as a breach, that he did not use the said last-mentioned premises in a tenant-like and proper manner, but made holes in the walls, damaged the doors, &c. At the trial, one contract of demise only, applying to one house only, was proved:—*Held*, that the plaintiff could not recover damages in respect of the breaches alleged in *both* counts, inasmuch as they must be taken to have reference to different messuages.

ment of rent, taxes, &c.; that it was agreed that the defendant should forthwith do certain repairs therein also specified, and should keep the windows, and all other parts of the premises, except the roof and main timbers and the outside, in effectual repair. Breach, that the defendant permitted the windows, and all other parts of the said premises, except the roof, &c., to be in want of repair. The second count stated, that in consideration that the defendant had become and then was tenant to the plaintiff of *a certain other* messuage or dwelling-house, garden, orchard, coach-house, stable, and premises of the plaintiff, he, the defendant, then promised to use the said last-mentioned messuage or dwelling-house, &c., in a tenant-like and proper manner, for and during the continuance of the said last-mentioned tenancy. Breach, that the defendant did not nor would, during the continuance of the said last-mentioned tenancy, use the said last-mentioned messuage, &c., in a tenant-like and proper manner, but on the contrary thereof, wrongfully and unjustly made divers large holes in the walls of the said last-mentioned messuage or dwelling-house, and damaged the doors thereof, took away the turf, and cut down and removed shrubs and flowers therefrom, &c. The third count charged the defendant with removing an iron gate erected by him, and which he had agreed to leave upon the premises.

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Pleas, first, non assumpsit; secondly, to the first count, that the plaintiff did not repair the premises pursuant to his agreement: thirdly, to the first count, that the defendant did not allow the windows, &c., to be in want of repair; fourthly, to the 2nd count, that the defendant did use the messuage, &c., therein mentioned, in a tenant-like and proper manner:—on which issues were joined.

At the trial before *Rolfe*, B., at the last Liverpool assizes, the plaintiff, having proved a written agreement for the demise of the premises in question to the defendant, as set out in the first count, and also a breach of the agreement

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by the non-repair of the windows and other parts of the premises, as stated in that count, was about to give evidence of the breaches charged in the second count; upon which it was objected for the defendant, that inasmuch as one contract of demise only had been proved, applying to one house only, viz. the express written contract stated in the first count, no evidence could be received of breaches assigned under another and different implied contract, on which the second count was framed. The learned Judge overruled the objection, and the plaintiff accordingly proceeded to give evidence of the cutting down and carrying away of fruit trees and flowers, and the taking away of turf, as alleged in the second count; and the jury found a verdict for the plaintiff on the two first issues, damages £10, and for the defendant on the third issue.

In Michaelmas Term, *Cresswell* obtained a rule nisi for a new trial, on the objection taken at Nisi Prius; against which

Dundas and *Cowling* now shewed cause.—The breaches in both counts are substantially the same. The defendant has entered into a special agreement in writing, which he is bound to keep in its terms; but he is also subject to the more general contract incident thereto, and implied by law from the relation of landlord and tenant, to keep the premises in tenantable repair. These two contracts—one express and the other implied—might well co-exist, unless the latter were expressly excluded by the former; as a tenant under leaseholds also subject to the custom of the country, unless the lease expressly exclude it: *Hutton v. Warren* (a). Could not a plaintiff recover for work and labour, when the work contracted for under a written agreement had been performed? [*Parke*, B.—There, there are two

(a) 1 M. & W. 466.

contracts made at different times: here, there are two things agreed to be done at the same time, one by an express written contract, the other implied from the relation of landlord and tenant, and imported into it.] The first, the express written contract, was executory, because it was made, so far as appears, before the defendant actually became tenant; the other arose afterwards, when he became tenant by taking possession. In *Powley v. Walker* (a), the declaration contained three counts; the first alleging that on such a day the defendant became and was tenant to the plaintiff of a farm, in consideration whereof he undertook and promised not to carry away from the farm any straw, &c.; the second count stated, that for the same consideration the defendant undertook and promised to cultivate the land in a good and husbandlike manner, according to the custom of the country; and the third, to manage and cultivate the land according to the course of good husbandry. On motion in arrest of judgment, the Court held that the bare relation of landlord and tenant was a sufficient consideration for the promises laid in the declaration. Therefore, from the moment the defendant became tenant, the contract to keep the premises in tenantable repair was implied by law, whether there was a previous writing or not. In *Hartley v. Harman* (b), the declaration contained one count only, stating a contract of service for certain wages per annum, subject to be determined at a month's notice, and alleging that the defendant dismissed the plaintiff without a month's notice, whereby he lost all the wages, &c., he might have acquired from being continued in the service: and it was held, that he was only entitled to recover as damages one month's wages, and that the arrears due to him at the time of his dismissal could only be recovered in indebitatus assumpsit for work and labour. There there was in fact

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(a) 5 T. R. 373.

(b) 3 P. & D. 567.

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but one contract only, yet it was held that the plaintiff ought to have had a second count in order to recover for the services actually performed.

Cresswell (with whom was *Martin*) contra.—The argument on the other side proceeds upon the fallacy of supposing that there are two contracts, one executory and the other executed. There is but one contract. Every contract whereby the relation of landlord and tenant is created, contains in it, as an implied part of it, an agreement to use the premises in a tenantable manner, unless expressly excluded. The tenancy is created, not by merely taking possession, but by the agreement entered into between the parties. It was competent for the plaintiff, therefore, to have stated in the first count all that the law would imply from the relation of landlord and tenant; but he could not recover damages for breaches alleged in a second count, having reference to another contract, and which were not set out in the first count. [He was then stopped by the Court.]

PARKE, B.—The rule must be absolute. The plaintiff has stated two contracts in his declaration, whereas one only was proved. He has alleged, as a second contract, an agreement to use the premises in a tenant-like manner; this he ought not to have done, unless he could prove a second contract in fact, relating to another and different messuage: as soon as it appears that there is but one contract and one messuage, he cannot recover on both. Here there is an express written agreement; there is also the additional contract implied by law; but it is all parcel of the original contract, by which the relation of landlord and tenant was created between the parties. That distinguishes this case from *Hartley v. Harman*. There the plaintiff might have recovered, on a declaration properly framed, wages pro ratâ for the time he had actually served: but it was equally clear, if he did not, that he

might, afterwards recover them in indebitatus assumpsit; because the implied contract arose, not from the original agreement between the parties, but from the performance of it. Here there is one contract only, arising, not from the taking possession of the land, but from the original agreement whereby the relation of landlord and tenant was created between the parties.

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ALDERSON, B.—There is in truth but one contract, namely, the written contract, together with an implication of law arising out of it, which latter is stated as a second contract. The defendant takes possession under certain stipulated terms, to which are to be added certain other implied terms.

GURNEY, B., and ROLFE, B., concurred.

Rule absolute.

HALL and Another, Assignees of John Taylor,
a Bankrupt, v. WALLACE.

TROVER for cotton and silk goods, furniture, &c. &c. The first count alleged a possession by the bankrupt before his bankruptcy; the second count laid the possession in the assignees. The defendant pleaded, 1st, not guilty; 2ndly, that the plaintiffs were not nor are assignees of the estate and effects of the said John Taylor. Then followed six other special pleas, the substance of which was, that the defendant, having obtained two judgments against the bankrupt, issued writs of fi. fa. thereon, under which the sheriff of Lancashire, before the date and issuing of the fiat, and before the defendant had any notice of the act of bankruptcy, seized the goods in question: that the

Jan. 22.

Where a trader commits an act of bankruptcy by procuring his goods to be taken into execution with intent to defeat or delay creditors, the execution, although levied *bonâ fide* by the judgment creditor, is not protected by the stat. 3 & 4 Vict. c. 29.

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said execution was bonâ fide levied and executed before the date and issuing of the fiat, and before the defendant had notice of any prior or of any act of bankruptcy by the said John Taylor committed. The defendant pleaded, 9thly, that the goods and chattels mentioned in the declaration were not the property of the plaintiffs as assignees; and 10thly, that the plaintiffs, as assignees, were not lawfully possessed of the said goods and chattels. On these several pleas issues were taken and joined. The defendant also gave notice of his intention to dispute the trading, the petitioning creditor's debt, and the act of bankruptcy.

At the trial before *Rolfe*, B., at the last Liverpool Assizes, the following facts appeared:—The bankrupt, Taylor, in March 1837, commenced business as a draper at Sunderland, with a sum of £600 advanced to him by the defendant, who was his father in law, and to whom, in the November following, he gave a warrant of attorney to secure that amount. About the same time, and in the following year, the defendant advanced him more money, and became surety for him to other creditors. Judgment was entered upon the warrant of attorney in March 1839. In May following, the bankrupt gave the defendant another warrant of attorney for £1000, upon which also judgment was forthwith entered up. In December 1839, Taylor's affairs having become irretrievably embarrassed, and an execution being out against his goods at the suit of another creditor, it was arranged between him and one Phillips, his brother in law, that Phillips should go over to Durham to the defendant, and give him information of it, in order to induce the defendant to issue executions upon his judgments. Phillips informed the defendant accordingly, and the defendant in consequence, on the 6th of December, issued two writs of fieri facias against Taylor's goods, under which the sheriff took possession of all his stock in trade and effects, the whole of

which were sold on the 19th, and the net proceeds, amounting to £1190, were paid over to the defendant. Notice was given to the defendant and to the sheriff, while the latter was in possession, that a fiat would be issued against Taylor; and on the 14th of January, 1840, a fiat was issued accordingly, the act of bankruptcy on which it was founded being the procuring his goods to be taken in execution at the suit of the defendant. On the 9th of March, the plaintiffs were appointed his assignees, and they brought this action for the value of the goods so taken in execution.

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It was contended for the defendant, that the executions were rendered valid by the operation of the stat. 2 & 3 Vict. c. 29, provided the jury should find that they were levied by the defendant *bonâ fide*, and without knowledge of the intention of the bankrupt to give him a preference. For the plaintiff it was answered, that that statute did not apply to the case, inasmuch as it had reference only to executions *bonâ fide* levied after a *prior* act of bankruptcy, whereas here the execution itself was a part of the transaction which constituted the act of bankruptcy. The learned Judge left it to the jury to say, first, whether the seizure in execution was by the procurement of the bankrupt; secondly, whether, if such procurement existed, the defendant was cognizant of it. The jury found that the bankrupt had fraudulently procured his goods to be taken in execution; but that the defendant had acted *bonâ fide*, and without any knowledge of the fraudulent intention of the bankrupt. The learned Judge directed that the verdict should be entered for the plaintiff, damages £1190, but gave leave to the defendant to move to enter a nonsuit, or a verdict for him upon such of the issues as the Court should think fit.

Wightman, in last Michaelmas term, obtained a rule nisi
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Cresswell and *Hoggins* now shewed cause. The stat. 2 & 3 Vict. c. 29, has no application to this case. That statute gives validity to executions *bonâ fide* [executed and levied before the date and issuing of a fiat, notwithstanding any *prior* act of bankruptcy, provided the party at whose suit the execution is levied had not, at the time of executing or levying such execution, notice of any *prior* act of bankruptcy. But it was never intended by the legislature to give validity to an execution which was *itself* an act of bankruptcy. This was a transaction altogether void, as being a fraudulent preference, and therefore wholly inoperative for the purpose of vesting any property in the person intended to be benefited; and could not prevent the title of the assignees, which commenced by relation from the time of the fraudulent procurement by the bankrupt: *Doe d. Lloyd v. Powell (a)*. Such a procurement does not the less operate as an act of bankruptcy, because the creditor is ignorant of the intention, or of the bankrupt's insolvency. And there is nothing in the recent statute to enable the creditor to obtain a property in the goods by means of a transaction which in itself is an act of bankruptcy. [*Parke, B.*—The effect of the act is to prevent the relation back of the title of the assignees to the act of bankruptcy, as against *bonâ fide* executions.] The reference in it to the stat. 6 Geo. 4, c. 16, s. 82, clearly shews that to be its meaning.

Hindmarsh (Wightman with him), *contra*.—It is said that the act of Parliament applies only to executions, not contemporaneous with, but subsequent to, the act of bankruptcy, because of the use of the words “*prior* act of bank-

(a) 5 B. & C. 308; 8 D. & R. 35.

ruptcy;" but such a construction leads to this absurd consequence, that, whether the levy be *before* or *after* the act of bankruptcy, in either case it is good; if it be at the same time, it is bad. [*Alderson*, B.—So far as a prior act of bankruptcy would make the levy invalid, the act applies, and no further.] Here, however, the act of bankruptcy was not complete until after the execution had been levied, because it consists of both the procurement and the levy; as the act of bankruptcy, by lying twenty-one days in prison, does not relate back to the time of the arrest, but is complete only at the expiration of the twenty-one days: *Higgins v. M'Adam* (a). [*Parke*, B.—The moment the sheriff laid his hands upon the goods to take them in execution, they became the goods of the assignees; then the subsequent sale of them was a conversion.] The intention of the legislature, in the recent statute, was that the execution creditor should be protected in all cases where the levy was antecedent to the fiat: *Nelstrop v. Scarisbrick* (b).

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PARKE, B.—I entertain no doubt in this case that the true meaning of the act of Parliament is as is contended for by the plaintiffs. The object of the statute 2 & 3 Vict. c. 29, as appears by the recital, was similar in principle to that contemplated by the stat. 6 Geo. 4, c. 16, s. 81. By the act of Geo. 4, all transactions entered into with the bankrupt more than two months before the issuing of the fiat, were declared to be valid, notwithstanding any prior act of bankruptcy committed, provided the person so dealing with the bankrupt had not notice of the bankruptcy. The effect of the stat. 2 & 3 Vict. c. 29, is to destroy the relation of the title of the assignees to the act of bankruptcy, not only in cases where the transaction was more than two months before the fiat, but as to all bonâ

(a) 3 Y. & J. 1.

(b) 6 M. & W. 684.

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fide transactions prior to the fiat. But it is obvious, that all the legislature meant to do was to prevent transactions which otherwise were valid from being invalidated by a prior act of bankruptcy. Here the transaction is invalid in itself, and therefore void. It is a parallel case to the delivery of goods by way of fraudulent preference, in contemplation of bankruptcy, which is invalid as against the assignees, although the party receiving them may not be cognizant of the dishonest intention of the bankrupt. Indeed, it may be doubted whether this is a case which comes within the meaning of the words "bonâ fide executed and levied," which may reasonably be construed to mean where there is bona fides in both parties: but however this be, it is clear that the statute only meant to protect valid transactions, and to prevent them from being affected by a prior act of bankruptcy: here the execution itself is the act of bankruptcy. No doubt, there must be a conversion after the title of the assignees has accrued; that is, after the act of bankruptcy; and if that be complete only upon the seizure, there was a sufficient proof of a conversion by the subsequent sale. As soon as the goods were in the hands of the sheriff, they became the property of the assignees, and they were converted by the subsequent sale. The rule must therefore be discharged.

ALDERSON, B.—I entirely agree. The statute meant, that those acts which before required to be invalidated by proof of a prior act of bankruptcy, should no longer be rendered invalid even by that proof, provided the party to be affected by them were ignorant, at the time of the transaction, of the existence of any prior act of bankruptcy. But acts which are invalid in themselves do not require invalidating; and here the execution itself is invalid, being in the nature of a fraudulent preference.

ROLFE, B., concurred.

Rule discharged.

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WHEELER v. WRIGHT.

ASSUMPSIT. The declaration stated, that the plaintiff put up to sale by auction certain premises, subject to the conditions, amongst others, that the purchaser should complete the purchase on or before the 25th day of March then next, and that the plaintiff should deduce and make a good title to the premises, commencing with the lease under which they were then held; that the defendant became the purchaser thereof; and that, although the plaintiff did deduce and make a good title to the said premises, commencing with the lease under which they were then held, yet the defendant did not, on or before the said 25th day of March, or at any other time, complete the said purchase.

Third plea, that the said premises were, to wit, on &c., demised by one Thomas Lowe to one William Barnett, his executors, administrators, and assigns, for a certain term of years still subsisting, subject to a covenant by the said William Barnett, his heirs, executors, and administrators, to keep the said premises in good repair, and, in the event of their not being in repair, that the said Thomas Lowe might and should enter upon and re-possess the same; that the right and interest of the said William Barnett vested by assignment in the plaintiff, and that the plaintiff,

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Declaration in assumpsit stated, that the plaintiff put up certain leasehold premises to auction, subject to conditions that the purchaser should complete the purchase by a certain day, and that the plaintiff should deduce a good title to the premises, commencing with the lease under which they were then held; and assigned as a breach, that although the plaintiff did deduce a good title commencing with the lease, the defendant did not complete the purchase according to the contract.

The defendant pleaded, that the premises were, on &c., demised by

T. L. to W. B. for a term still subsisting, subject to a covenant by W. B. to keep the premises in repair, and for re-entry by T. L. in default thereof: that the interest of W. B. vested by assignment in the plaintiff, and that the plaintiff, after the assignment, suffered the premises to be out of repair, and that they continued so up to the time of sale, so that the term might, at the option of T. L., be determined; and that the plaintiff, by reason of the premises, had not, at the time of the sale or afterwards, any valid title to the premises. The defendant pleaded also, that the plaintiff had not, at the time of the sale or at any time afterwards, any good and valid title to the premises, and did not deduce or make a good title to the defendant.

On special demurrer to these pleas, the former was held bad, as being an argumentative denial of the allegation in the declaration, that the plaintiff made a good title; and the latter, on the ground that, if the defendant meant to object to the validity of the lease, he ought to have confessed the allegation of title in the declaration as it stood, and then to have pointed the plea specifically to the objection that the lessor had no title.

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after the said assignment, suffered and permitted the said premises to be out of repair; and that they continued and were so out of repair at the time of the said sale, and of the commencement of this suit, so that the said term might, at the option of the said Thomas Lowe, be determined; and that the plaintiff, by reason of the premises, had not, at the time of the said sale, or at any time afterwards, any valid title to the said premises. Verification.

Fourth plea, that the plaintiff had not, at the time of the said sale of the said premises, or at any time after the said sale, any good and valid title to the said premises; and that he did not deduce or make a good title thereof to the defendant. Verification.

The plaintiff demurred specially to these pleas, assigning as grounds of objection to the former, that it did not sufficiently confess and avoid, or traverse, the cause of action alleged in the declaration; that it was but an argumentative denial of the allegation that the plaintiff deduced good title, and ought to have concluded to the country, and not with a verification; and that the plea was a mere statement of evidence, as to which no certain issue could be taken. The causes of demurrer to the fourth plea were, that it alleged generally that the plaintiff did not make a good title to the defendant, whereas, under the condition of sale, the plaintiff was only bound to make a good title commencing with the lease under which the premises were held; that if the plea meant that the plaintiff had not deduced a good title commencing as aforesaid, then it did not sufficiently traverse, nor confess and avoid, the declaration, and imperfectly concluded with a verification. Joinder in demurrer.

Gale, in support of the demurrer, was stopped by the Court.

Erle, contra.—The third plea sufficiently confesses and

avoids the allegations of the declaration. [Lord Abinger, C. B.—It appears to be merely an argumentative denial that the plaintiff made a good title: if it be such a denial, it ought to have concluded to the country]. It admits a good *primâ facie* case on the part of the plaintiff, but sets up as an answer to it that the title is defeasible. There may be an apparent good title deduced commencing with the lease, and there may be an extrinsic fact, such as a forfeiture, which invalidates it. The plaintiff, on the other hand, may shew, by way of replication, that the landlord has released the covenant, or accepted rent. This is within the cases in which a party may either rely on a general traverse, or plead the facts specially, so as to give the opposite party a knowledge of the question he intends to try. [Parke, B.—The question is, in what sense the words of the contract are to be understood. If it means that the lease is to be shewn to be a valid lease, then a traverse would have answered the defendant's purpose; if only that the plaintiff is to prove the several steps of the transfer of the lease to himself, perhaps the plea may be good. You say that the latter is the sense in which the words are to be understood.] It may be admitted that the defendant might have raised the question in dispute by a traverse of the allegation, but he might also put upon the record facts amounting to matter of law, shewing that the title is *defeasible*. It is on this principle that infancy, coverture, &c., were pleadable specially. In such cases the plea assumes that the facts stated by the plaintiff *primâ facie* shew that the promises were made by the defendant, but answers them by adding other facts, which, taken altogether, shew the *primâ facie* cause of action to be destroyed by matter of law. Bac. Abr. Pleader, (b. 3). *Carr v. Hinchliffe* (a), *Hussey v. Jacob* (b), *Maggs v. Ames* (c). [Alderson, B.—If the averment in

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(a) 4 B. & C. 547; 7 D. & R. 42. (b) 1 Ld. Raym. 87.

(c) 4 Bing. 470; 1 M. & P. 294.

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the declaration means that the plaintiff had a good title against all the world, the plea has not answered it.] The plaintiff may in reply take the same course, and say, "True it is the plea *primâ facie* constitutes a defence; but that is only because you, the defendant, have omitted certain facts, which I supply, and shew that *primâ facie* defence not to be maintainable." The plea admits only that the plaintiff deduced an apparent good title commencing with the lease, but shews *aliunde*, in answer to the plaintiff's claim, that the lease is, *primâ facie*, invalid.

Next, as to the fourth plea.—In *Spratt v. Jeffery* (a), the Court of King's Bench held, that when on a sale of leasehold premises the purchaser agreed to accept an assignment, without requiring the lessor's title, he could not raise any objection to that title: but in *Shepherd v. Keatley* (b), this Court, upon a clause in nearly the same terms, ("that the vendor should not be obliged to produce the lessor's title"), came to a contrary conclusion; and held that the purchaser was nevertheless entitled to insist on defects in the lessor's title which he had discovered *aliunde*. So here, the defendant admits that all the plaintiff was bound to do was to deduce a good title commencing with the lease; but if he finds *aliunde* that the lessor had no title, he contends that he is at liberty to shew it: he therefore says, that the plaintiff had not *any* good or valid title. It is part of the consideration for which the defendant pays his money, that these are leasehold premises held for a certain term; and he has a right to shew that that consideration has failed. The only difference is, that the *onus probandi* is changed, and it is thrown on the defendant to shew it, instead of its being imposed as a condition precedent on the plaintiff. [Parke, B.—The proper form of plea, as it strikes me, would have been to have confessed the allegation as it stands, in the sense in which it is used in the

(a) 10 B. & C. 249; 5 Man. & R. 188.

(b) 1 C., M., & R. 117.

delaration, and then to have pointed the plea specifically to the objection, that the lessor had no title. Lord *Abinger*, C. B.—I think we must interpret the plea, as it stands, to mean that the title is bad for matter posterior to the lease.]

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Lorn ABINGER, C. B.—The Court are inclined to think that both pleas are bad on special demurrer. The third plea amounts only to an argumentative denial of the plaintiff's being able to make a good title, instead of containing a distinct traverse. And as to the fourth, if the defendant intended to rely on any objection to the title of the lessor, he ought to have confessed the allegation in the declaration, and have set forth the defect of title more particularly in his plea.

PARKER, B.—I am of the same opinion. The third plea is merely an argumentative denial of the allegation of title in the declaration. The cases which have been referred to by Mr. *Erle* apply to an avoidance of the contract declared on; as where the defendant admits a cause of action at common law, and avoids it by statute; or admits a *primâ facie* cause of action, and avoids it by coverture: but this is a denial only of an averment in the declaration. I agree that the fourth plea is bad, for the reasons already given.

ALDERSON, B., and GURNEY, B., concurred.

Leave to the defendant to amend on payment of costs; otherwise

Judgment for the plaintiff.

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The declaration stated, that the defendant caused to be put up to sale by auction certain premises, for the residue of a term of years, on the condition, amongst others, that the defendant should deduce and make a good title thereto, commencing with the lease of the premises under which they were then held; and assigned as a breach, that the defendant did not deduce a good title commencing with the lease.

Plea, that the premises so put up to sale were premises of which the defendant was possessed under a mortgage from the plaintiff for the residue of the term, and that they were put up to sale under a power of sale in the mortgage: that before and at the time of the mortgage, the

plaintiff held the premises under a lease from T. L., subject to a covenant by the plaintiff for repair, and a proviso for re-entry, or the cesser of the term, at the option of T. L., on breach of such covenant: that the plaintiff, before and at the time of the sale, had full knowledge of all the premises: that the defendant did deduce a good title to the premises, commencing with the lease, in all respects except this, that the premises were out of repair, of which the plaintiff had full knowledge: that they were, at the time of the sale, in as good repair as at the time of the mortgage; and that T. L. had not re-entered or claimed to re-enter, or in any way avoided the lease:—*Held* bad on general demurrer.

ASSUMPSIT.—The declaration stated, that the defendant caused to be put up to sale by auction certain premises, for a residue of a certain term of years then unexpired therein, upon the condition, amongst others, that the defendant should deduce and make, or cause to be deduced and made, a good title thereto, commencing with the lease of the said premises, under which they were then held. Breach, that the defendant did not deduce or make, or cause to be deduced or made, to the plaintiff, a good title to the said premises, commencing with the said lease.

Plea, that the said premises so put up to sale by auction were premises whereof the defendant was then possessed for a certain term of years then to come and unexpired, by virtue of an indenture of mortgage theretofore made, whereby the same premises were assigned by the plaintiff to the defendant, for such residue of the said term, by way of mortgage, and for the purpose of securing the payment by the plaintiff to the defendant of a certain sum of money in the said indenture mentioned; and that the said premises were so put up and exposed for sale, and so agreed to be sold by the defendant, as in the first count mentioned, under and by virtue of a certain power of sale contained in the said indenture, whereby the plaintiff granted to the defendant a full power to sell the same, upon the non-payment of the said sum of money: that before and at the time of the making of the said assignment, the plaintiff held the said premises as tenant there-

of to one Thomas Lowe, by virtue of a certain indenture of lease, bearing date, &c., and subject to a certain covenant in the said indenture of lease contained on the part of the plaintiff to be performed, for the repairing and keeping in tenantable repair the said premises, and subject to a certain proviso for the re-entry of the said Thomas Lowe into the said premises, and for the cesser and determination of the said term, at the option of the said Thomas Lowe, upon breach (amongst other things) of the said covenant: that the plaintiff, before and at the time of the said sale, and of the making of the said agreement, and during all the time in the said first count mentioned, had full knowledge and notice of all the premises herein-before-mentioned; and that the defendant did, before and at the time appointed for the completion of the said purchase, make and deduce to the plaintiff a good title to the said tenements and premises, commencing with the lease under which the said premises were held at the time of the said contract of sale, (being the same lease in this plea before-mentioned), in all respects excepting this, to wit, that the said premises were, at the time of the said contract of sale, and at the same time so appointed for the completion of the said contract, out of repair: that the plaintiff, before and at the time of the said sale, and during all the time in the said first count mentioned, had full knowledge and notice that the said premises were out of repair as aforesaid: that at the time of the said sale, and during all the time in the said first count mentioned, the said premises were in as good a state of repair as the same were in at the time of the said assignment thereof by the plaintiff to the defendant as aforesaid; and that the said Thomas Lowe had not, before or during any part of the time in the first count mentioned, re-entered or claimed to re-enter upon the said premises, or any part thereof, for the breach of the said covenant, or otherwise; nor had he or any other person in any way avoided the said lease, but the

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Plea, same was, during all the time in the said first count mentioned, wholly subsisting and undetermined. Verification.

RETT Replication, de injuriâ.—Special demurrer, and joinder.

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Gale appeared in support of the demurrer, but was called upon to support the plea.—The plaintiff, by assigning the premises by way of mortgage to the defendant, warranted the goodness of the title. His acts amount in effect to a covenant for title. He is therefore estopped from now saying that the title is bad, and that the premises are out of repair. [*Parke, B.*—In *Deering v. Farrington* (a), Lord *Hale* lays it down that the words “assign, transfer, and set over,” do not amount to a covenant against an cign title. But, besides, there is no estoppel against the plaintiff to prevent him from saying that the premises are out of repair. If he has contracted that they are in repair, and they are not, he is liable to an action for the breach of that contract.] It is evident that the plaintiff must have contemplated a purchase of the property subject to this defect in the title, of which he was aware; he cannot, therefore, take advantage of it to avoid the contract of purchase.

Erle appeared for the plaintiff, but was not called upon.

PARKE, B.—I am of opinion that this plea is bad in substance, and affords no answer to the declaration. The defendant has entered into an express contract to deduce a good title to the premises by a specified day: and it affords no reason for his not performing that contract, that the plaintiff, at the time of the sale, was aware of the defect of title by the breach of the covenant to repair. The defendant might have known that the lessor had waived the forfeiture by a subsequent receipt of rent; or he may have

(a) 3 Keb. 301.

entered into the contract upon the understanding that he could make a good title, by inducing the lessor to receive rent or sign a release, or in some other manner waive the forfeiture. The judgment must be for the plaintiff.

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ALDERSON, B.—I am of the same opinion. Although both parties may have been cognizant, at the time of the sale, that the title was defective by reason of the dilapidated state of the premises, there is nothing to shew that the defendant might not have contracted upon the understanding that he should remove that defect by the day named, by some of the means within his power. If a bill had been filed for a specific performance of the contract of sale, it would have been matter for the consideration of the Court of Equity, whether it ought or ought not to order the defendant to obtain a release from the landlord.

The rest of the Court concurred.

Judgment for the plaintiff.

THOMPSON v. IRVING.

ASSUMPSIT on a policy of insurance. The declaration stated, that the plaintiff caused to be made a certain policy of insurance with the Alliance Marine Assurance Company, upon a certain ship or vessel called the *Gustaf*, on a voyage from Dantzic to Hull; that the said ship and the goods on board the same, for so much as concerned the assured, should be valued at £650 on bristles, and £30 on beer; and that the goods were shipped on board the said ship at Dantzic, to be carried and conveyed therein on the said voyage. The declaration then averred a loss

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The Navigation Act, 3 & 4 Will. 4, c. 54, does not prohibit the importation for home consumption (except in British vessels, &c.), of any goods the produce of Europe, excepting those specifically enumerated in the 2nd section.

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of the ship and goods by perils of the seas, and alleged as a breach the non-payment by the defendant of the sums of money insured thereon as aforesaid.

Plea, that the said goods so shipped on board the said vessel as in the declaration mentioned, were certain goods manufactured within the kingdom of Prussia, in Europe, and were so shipped on board the said vessel at Dantsic, within the said kingdom of Prussia, to be imported from thence into the United Kingdom of Great Britain and Ireland, that is to say, into the port of Hull aforesaid, for the purpose of being used within the said United Kingdom: and the defendant further saith, that the said vessel, upon which the said goods were so shipped on board as aforesaid, was not, at the time the said goods were so shipped on board thereof, a British ship, or a ship of the country in which the said goods were so manufactured as aforesaid, or a ship of the country from which the said goods were so imported; but on the contrary thereof, the said ship was, at the time the said goods were shipped on board the same and imported as aforesaid, a Swedish ship; of all which said premises the plaintiff, before and at the time of making the said policy of insurance in the first count mentioned, had notice, and whereby the said voyage became and was wholly illegal, and contrary to the form of the statute in that case made and provided. Verification.

Special demurrer, assigning for causes, that the said goods, that is to say, the said bristles and beer, insured by the said policy, were not prohibited by law from being imported into the United Kingdom to be used therein, by such a ship as in the plea mentioned; and also, that the mere shipping of the goods in the plea mentioned, was not such an illegal act as to avoid or defeat the contract of insurance. Joinder in demurrer.

Martin, in support of the demurrer.—The question is

this case arises on the construction of the Navigation Act, 3 & 4 Will. 4, c. 54, the second section of which enacts, that the several sorts of goods *thereinafter enumerated*, being the produce of Europe, that is to say, masts, timber, boards, &c., [but not including bristles or beer,] shall not be imported into the United Kingdom to be used therein, except in British ships, or in ships of the country of which the goods are the produce, or in ships of the country from which the goods are imported. That prohibition applies only to the enumerated articles. Besides, all that is prohibited is the importation for use: even the goods enumerated may be imported for re-exportation; s. 21. The plea, therefore, is clearly bad.

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The Court then called on

W. J. Alexander, in support of the plea.—It is alleged in the plea that these goods were imported to be used in the United Kingdom; the 21st section, therefore, does not apply. As to the other point, if the Court consider it clear that the goods prohibited by the 2nd section are only the goods enumerated therein, and not goods the produce of the foreign country generally, the plea is certainly insufficient; but it is to be observed that the latter part of the section has the words—"of which *the* goods"—not "*such* goods"—"are the produce." Again, if only the articles actually mentioned in sect. 2 are prohibited, what necessity was there for the fifth section, which enacts that all manufactured goods shall be deemed to be the produce of the country of which they are the manufacture? [*Parke*, B.—To avoid the necessity of using the word "manufacture" as well as "produce."] .

Lord ABINGER, C. B.—It is clear that the 2nd section of the act prohibits the importation of no other goods than those mentioned in it. The plea is therefore clearly bad.

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PARKE, B.—There is no prohibition at all except in the 2nd section, and that clearly applies only to the articles there enumerated. The words “the goods” must be interpreted to mean “such goods.” Then the legislature having in the second and two following sections used the word “produce,” the 5th section is introduced to explain that that word is intended to mean not only the natural productions of the country, but also goods the manufacture of that country.

ALDERSON, B., and GURNEY, B., concurred.

Judgment for the plaintiff.

HUMPHREYS v. O'CONNELL.

Jan. 20.

To an action by indorsee against acceptor of a bill of exchange, the defendant pleaded that it was accepted for a gaming debt, and that the plaintiff, before the indorsement to him, had notice thereof:—
Replication, *de injuriâ*:—*Held*, good on special demurrer.

ASSUMPSIT by indorsee against acceptor of a bill of exchange for £500, drawn by H. Barnett, payable six months after date, and indorsed by Barnett to Moss and Humphreys, and by them to the plaintiff.

Pleas, first, that long before the drawing or accepting of the bill of exchange in the declaration mentioned, to wit, on the 1st day of February, 1839, and on divers other days and times afterwards, and before the 22nd day of April, 1839, the said H. Barnett did knowingly lend to the defendant, and the defendant did borrow of him, divers sums of money, amounting, to wit, to £650, for the purpose of enabling the defendant illegally to game and play therewith at a certain illegal game, played with dice, called or known by the name of French Hazard, contrary to the form of the statute, &c.; and the said H. Barnett, at the times of his so lending the said monies, well knew that the defendant so borrowed the same for the purpose aforesaid; and that, for securing the payment of the said

sums so lent as aforesaid, the defendant afterwards, to wit, on the 22nd April, 1839, accepted three several bills of exchange, drawn by the said H. Barnett upon and directed to the defendant, and payable to the said H. Barnett, [describing them]: and the defendant says, that long before the drawing or acceptance of the said bill in the declaration mentioned, to wit, on the 26th day of May, 1839, and on divers other days and times afterwards, and before the 29th day of August, 1839, the said H. Barnett did knowingly lend to the defendant, and the defendant did borrow of him, divers other sums of money, amounting, to wit, to £565, for the purpose of enabling the defendant to game and play therewith at a certain illegal game, &c., contrary to the form of the statute, &c.: and the said H. Barnett, at the times of his so lending the said monies, well knew that the defendant so borrowed the same for the purpose aforesaid: that the said several bills, so payable as aforesaid, being due and unpaid, and the said sum of £565 being also unpaid to the said H. Barnett, he the defendant, in consideration thereof, and for and on account of the said bills, and as a security for the payment of the same, and also of the said sum of £565, accepted the said bill in the declaration mentioned, and also a certain other bill drawn by the said H. Barnett, and directed to the defendant, for the payment of the sum of £515 to the said H. Barnett, or order, eight months after the date thereof: and the said H. Barnett drew the said bills for and upon that consideration, and on that account: and the defendant further says, that the said Moss and Humphreys, and the plaintiff respectively, before the said indorsements to them respectively, had full knowledge and notice of the premises aforesaid. Verification.

The second plea was in similar terms, except that it alleged the monies not to have been lent by Barnett to the defendant, but to have been won of the defendant by Barnett and others, at hazard.

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The third and fourth pleas were the same as the first and third respectively, except that they averred want of consideration, instead of notice.

Replication, *de injuriâ*.—Special demurrer, assigning for causes, that the matters of defence alleged in the pleas do not amount to an excuse for the non-performance by the defendant of his promise, but shew that he never was liable to perform that promise, and that it was totally void, and by the illegality thereof the defendant was wholly discharged by law from performing the same, and the defendant never was liable to pay the said bill to the plaintiff, under the facts stated in the pleas.—Joinder in demurrer.

Willis, in support of the demurrer.—The question is, whether these pleas amount to matter of excuse only; if so, according to the rule laid down in *Crogate's case* (a), and now extended to actions *ex contractu*, the replication *de injuriâ* is no doubt admissible. If the pleas pointed to facts occurring after the breach of the promise alleged in the declaration, that would be matter in discharge, not in excuse, and the replication *de injuriâ* would be bad. If, on the other hand, they alleged matter which happened between the contract and the breach, then the replication would be good: *Jones v. Senior* (b). But this is a third case in which the defence is founded upon matter existing at the time of the contract, and which goes to the avoidance of the contract itself, by shewing that it ought never to be performed, and that the plaintiff has in law no right to sue upon it. The pleas in effect amount to this, that the contract upon which the plaintiff sues—viz. the indorsement to him, was illegal and void. This point arose in the case of *Parker v. Riley* (c), but was not expressly decided: but *Parke*, B., said of the plea in that case—"It either amounts to the general issue, or is

(a) 8 Rep. 67, a.

(b) 4 M. & W. 123.

(c) 3 M. & W. 230.

in avoidance of the contract itself: on the first supposition, it is clear that the replication is bad; on the other, we are strongly inclined to think it so." *Isaac v. Farrar* (a) will be relied upon for the plaintiff; but it is distinguishable from the present case, because there the allegation of fraud was immaterial to the question which arose on the plea. [Lord Abinger, C. B.—Was the plaintiff in this case affected by the original fraud, or only by notice of it?] Certainly, only by notice. One of the grounds of the judgment in *Isaac v. Farrar*, the inconvenience of not allowing this general replication, because otherwise the proof of value would in such cases be thrown upon the indorsee, appears to be removed by the case of *Edmunds v. Groves* (b). There, in answer to a plea similar to the present, the plaintiff replied that the note in question was indorsed to him without notice of the illegality, and for good value and consideration; and it was held, that although the illegal gaming was thus admitted on the record, it was not so admitted as that the jury could infer it as a fact against the plaintiff, and that he could be compelled to begin at the trial. [Parke, B.—It is very difficult to distinguish this case from *Isaac v. Farrar*; because this is not a question between the drawer and acceptor; if it were, there would be great reason for saying the contract itself was avoided; but there is a new contract by the indorsement: then the question is, whether the plea does not consist of mere matter of excuse for the non-performance of the *primâ facie* contract by indorsement. In *Isaac v. Farrar*, the contract was void between the original parties, as here.] The plea, alleging notice, shews that it was illegal in the plaintiff, with such notice, to take the bill: the contract of indorsement arises out of his own illegal act. [Parke, B.—He takes it with his eyes open, that is all; and therefore he cannot consider it unjust if

(a) 1 M. & W. 65.

(b) 2 M. & W. 642.

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the objection is taken against him.] He has no claim except out of a contract which he knew to be illegal. [PARKER, B.—In *Noel v. Rich* (a), the Court held the replication good, although the plea sought to avoid the contract on the ground of fraud.] That was on general demurrer.—But it may be doubted whether a bill given for a gaming transaction is not still void in the hands of an indorsee. It clearly was so before the stat. 5 & 6 Will. 4, c. 41 *Buryer v. Bampton* (b), *Edwards v. Dick* (c): and Lord ALINGER, C. B., in *Edwards v. Groves*, expresses a doubt whether that statute had the effect intended. [ROFFE, B.—All former acts making the instrument void are repealed by it.]

J. Henderson, contra, was stopped by the Court.

LORD ALINGER, C. B.—We think that this case is governed by *Isaac v. Farrer*. The plea consists entirely of matter of excuse by this defendant as against this plaintiff. The plaintiff, being a holder for value, is *prima facie* entitled to recover upon the bill, even where there has been want of consideration, or illegality, between the original parties to it.

PARKER, B.—I am also of opinion that this case is governed by *Isaac v. Farrer*. As between these parties the bill is not void for the illegality, but the defence amounts to mere matter of excuse for the non-performance of the contract by indorsement, to pay it to this plaintiff.

GURNEY, B., and ROLFE, B., concurred.

Judgment for the plaintiff.

(a) 2 C., M. & R. 360. (b) 2 Stra. 1155. (c) 4 B. & Ald. 212

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WINDSOR v. HERBERT.

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ASSUMPSIT for work and labour as an attorney and solicitor.

Plea, that the plaintiff, before and at the time of the accruing of the causes of action in the declaration mentioned, was an attorney of the said Court here, and that the said sum of money, &c. is claimed by the plaintiff to be due for work, and materials for the same provided, and for fees in respect thereof, and for money theretofore paid by the plaintiff, as the attorney of and for the defendant, in and about certain proceedings at law, to wit, in the said Court here, which had been commenced and prosecuted against the defendant, and wherein the plaintiff acted as the attorney of and for the defendant: And the defendant further says, that although the plaintiff did, before the commencement of this suit, to wit, on the 1st day of June, 1840, deliver to the defendant a bill of the plaintiff's fees, charges, and disbursements for and in respect of the said work and materials, fees, and money, so done, provided, and paid as aforesaid, subscribed with the proper hand of the plaintiff, according to the statute in such case made and provided, yet a month from such delivery had not before the commencement of this suit expired; and the defendant further says, that the plaintiff did not at any other time before the commencement of this suit, deliver unto the defendant, or leave for him at his dwelling-house or last place of abode, any other bill of the plaintiff's fees, charges, and disbursements, &c., or any of them, or any part of them, subscribed with the proper hand of the plaintiff, according to the statute, &c.—Verification.

Replication, that after the accruing of the said causes of action, and before the commencement of this suit, to wit, on &c., the defendant was duly admitted and inrolled an attorney of the Court of our Lady the Queen before the

It is not necessary that an attorney plaintiff should deliver a signed bill of costs a month before action brought, where the defendant has been admitted an attorney after the bill became due, but before the commencement of the action.

CASES IN THE EXCHEQUER,

Pleas,
11.
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DEOR
ERT. Queen herself, and that the defendant, before and at the time of the commencement of this suit, was, and still is, such attorney.—Verification.

Special demurrer, assigning for causes, that the averment in the replication is immaterial and impertinent, and does not amount to an avoidance of the matter alleged in the plea, and admitted by the replication: that the replication does not aver, that at the time of the accruing of the said causes of action to which the plea is pleaded, the defendant had been duly admitted and inrolled an attorney of any court: that it does not shew that the business done by the plaintiff for the defendant was agency business by the plaintiff as an attorney, and that the defendant was then an attorney: and that it does not aver that a month, from the delivery of the bill mentioned in the plea, had expired before the defendant was admitted and inrolled an attorney as in the said replication mentioned, &c.—Joinder in demurrer.

W. H. Watson, in support of the demurrer.—The stat. 2 Geo. 2, c. 23, s. 23, is general in its terms, and applies to all persons to be charged by the bill, whether attorneys or not. Then the stat. 12 Geo. 2, c. 13, s. 6, limits it to some extent; providing that the former statute shall not extend “to any bill of fees, charges, and disbursements due from any attorney or solicitor to any other attorney or solicitor; but every such attorney, &c. may use such remedies for the recovery of his fees, &c. against such other attorney or solicitor, as he might have done before the passing of the said act.” The object of this enactment clearly was to protect non-professional persons, who were so when the bill was contracted; supposing an attorney to be sufficiently cognizant of the course of business to protect himself. But is it not preposterous to say, that because the party is admitted an attorney *after* he has become indebted for fees, but within the month after the delivery

of the bill, he is not to be allowed to have the bill taxed? *Esch. of Pleas, 1841.*
 If so, the only mode of trying the charges will be before the jury. The Court have no authority to direct the taxation of an agency bill: *Waymouth v. Knipe (a)*. Where the party is an attorney at the time the business is done, the legislature supposes him cognizant of the terms on which it is done, so that there is no dispute about them: but that does not apply to a party who afterwards becomes an attorney. [*Rolfe, B.*—When the action is brought, the defendant *does* understand the terms.] The case of *Ford v. Maxwell (b)* is undoubtedly a decision against the defendant, but it may be doubted whether it was well decided, and it does not appear to be warranted by the terms of the statute. [*Parke, B.*—As soon as the defendant was made an attorney, the bill became due from one attorney to another.]

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Lush, *contra*, was stopped by the Court.

LORD ABINGER, C. B.—I think the case is within the words of the statute. The Court of Common Pleas have already construed it so, and I see no reason why we should construe it differently.

PARKE, B.—It is enough to say that the point has been already considered, and that the statute has been construed to apply to the case of a person who becomes an attorney after the business is done. The defendant knows well enough what he has to pay upon the bill: it is not the case of an inexperienced person.

GURNEY, B., and ROLFE, B., concurred.

Judgment for the plaintiff.

(a) 3 Bing. N. C. 387; 3 Scott, 764. (b) 2 H. Bl. 589.

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The Court has power, under the stat. 3 & 4 Will. 4, c. 42, s. 39, to enlarge the time for an arbitrator to make his award, where the arbitrator, having power to do so, has allowed the time limited by the submission for making the award to elapse without doing so.

PARBERRY v. NEWNHAM.

NEWNHAM v. PARBERRY.

THESE causes were referred to arbitration under an order of *Tindal*, C. J., (which was afterwards made a rule of Court), "so as the arbitrator should make and publish his award in writing, ready to be delivered to the parties, or any or either of them, if they should require the same, on or before the 27th day of May, 1840, or on or before such further or ulterior day as the arbitrator should from time to time appoint, and signify in writing under his hand on the said order." The arbitrator proceeded with the reference, and held several meetings; but before the cases were brought to a conclusion, the time limited in the order of reference had expired, without the arbitrator's having made any indorsement on the order enlarging it. No application was made to him by either of the parties to enlarge the time; but when he was about to make his award, the plaintiff objected that his authority was at an end. It appeared also, that, after the time had expired, the defendant's attorney informed the plaintiff's attorney of the circumstance, when the latter answered—"Very well, I suppose the time can be enlarged by a Judge's order:" and both parties afterwards attended meetings before the arbitrator.

In Michaelmas Term, *Gaselee*, Serjt., obtained a rule to shew cause why the time for making the award should not be enlarged until the first day of Hilary Term. In the same term,

Sir *F. Pollock* and *Macaulay* shewed cause.—The question is, whether under the circumstances of this case the Court have power to enlarge the time for making the award, under the stat. 3 & 4 Will. 4, c. 42, s. 39, which enacts, "that the power and authority of any arbitrator

or umpire appointed by or in pursuance of any rule of Court or Judge's order, or order of *Nisi Prius*, in any action now brought or which shall hereafter be brought, &c., shall not be revocable by any party to such reference, without the leave of the Court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a Judge: and the arbitrator or umpire shall and may and is hereby required to proceed with the reference notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference; and the Court, or any Judge thereof, may from time to time enlarge the term for *any such* arbitrator making his award." That enactment appears to give the Court power only in cases where there has been an attempt to revoke the submission. Its object was, that if the arbitrator were disposed to assist either party by not making his award, he should not have power to do so, but should be compellable to proceed. The words "such arbitrator" mean the arbitrator who has been required to proceed with the reference notwithstanding the revocation. In *Burley v. Stephens* (a), this Court intimated an opinion that the statute was not so restricted, but extended to all cases of arbitration falling within the commencing words of the clause: but the observation of the Court in that respect was not necessary to the decision of the case. In a subsequent case of *Doe d. Jones v. Powell* (b), *Patteson, J.*, expressed a contrary opinion. His Lordship, referring to the clause which gives the Court power to enlarge the time, says, "That means rather that the Court may enlarge the time, where no power is given to the arbitrator to do so; if there is such a power, it is for him to do it; but I doubt if the Court would do it in a case where the parties, or the arbitrator, will not consent to proceed with the reference." [*Parke, B.* — He does not express any opinion that the clause is

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(a) 1 M. & W. 156.

(b) 7 Dowl. P. C. 539.

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not general, or that it is confined to cases in which the parties have attempted to revoke the submission.] The learned Judge thought that where power is given to the arbitrator to enlarge the time, and he fails to do so, the Court had no power to do it in his stead. In *Potter v. Newman* (a), it was undoubtedly decided that the clause was not so limited as has been suggested. But this case goes much further: because here the time is already extinct; and it is a misapplication of language to speak of *enlarging* it. If the Court should now interfere, it is granting a new term: they cannot *enlarge* that which is altogether gone. This is in effect asking the Court to make a new submission.

Cresswell and Gaselee, Serjts., contra.—The Court have now power, under the statute, to enlarge the time for making the award. It is conceded that they would have authority to do so, if there had been an attempt at revocation by one party; and there is no reason why an equal power should not exist, when both parties have been willing to proceed. *Burley v. Stephens* and *Potter v. Newman* are sufficient authorities to shew that the clause in question applies to all cases where the parties have agreed to submit themselves to the Court. But it is said the authority of the Court cannot be applied, where the time originally limited has already expired. But an order of reference does not become a nullity by the time limited for making the award having been allowed to expire: *Hall v. Rouse* (b). There, by an order of *Nisi Prius*, a verdict was entered for the plaintiff, subject to a reference. The plaintiff's attorney neglected to deliver the order of reference to the arbitrator until after the time for making the award had expired, and on the parties afterwards meeting before the arbitrator, the defendant refused to proceed

(a) 2 C., M. & R. 742.

(b) 4 M. & W. 24.

with the reference; whereupon the plaintiff, without making any application to the Court, took the cause down again to trial, and again obtained a verdict. The Court held, that this latter trial and verdict were irregular, the first verdict not having been in any way got rid of. In that case *Parke, B.*, says—"Now, although the time have expired, it may be enlarged on application to the Court under the 3 & 4 Will. 4, c. 42, s. 39; and if you can go on with the reference, it is difficult to see how the verdict can be got rid of unless by the plaintiff's consent, or by some waiver." If any other construction were adopted, the statute would virtually be rendered nugatory. It was the manifest intention of the legislature that the reference should not be rendered unavailable by any such accidental omission as this. The word "enlarge" may well be construed "extend." Besides, the Court have power "from time to time" to enlarge the term: that cannot, in strictness, apply to an enlargement of the original term only. The time for a sheriff's returning a writ is often *enlarged*, after the original time has expired. [*Parke, B.*—It would be seldom that a case could be made out for enlargement, if it must be done before the time has expired: it is not until it is just expiring that you can see symptoms of its not being about to be enlarged by the arbitrator; and you may not be able, at all events, to get the rule absolute in time]. Nor, indeed, can the parties know that the arbitrator has not enlarged it. [*Parke, B.*—You have still to contend with the judgment of my Brother *Patteson*, that the act does not apply to cases where the arbitrator has power to enlarge the time if he thinks fit.] Surely the purpose of the act is to compel the arbitrator to go on; and to put the Court, whenever it becomes necessary, in the same situation as the parties themselves intended to put the arbitrator.

But further, the facts, as disclosed on the affidavits, amounted in effect to a consent to enlarge the time. The

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plaintiff's attorney, when made aware of the difficulty, said, that an application might be made to the Court; and he went on subsequently with the reference. There was, in substance, an enlargement of the time by consent of the parties: *Hallett v. Hallett* (a).

Cur. adv. vult.

The judgment of the Court was now (Jan. 20) delivered by

LORD ABINGER, C. B., who said:—The Court have considered this case, and have come to the conclusion that they have still the power, under the act of Parliament, to enlarge the time for making the award; and we have accordingly given directions to the officer that a rule shall be drawn up for enlarging the time until the first day of Easter Term; the time mentioned in this rule having expired while the case has been under the consideration of the Court.

Rule accordingly.

(a) 5 M. & W. 25.

Jan. 20.

A testator, after directing that all his debts and funeral expenses should be paid by his executors thereinafter named, devised to A. a particular farm, without

DOE *d.* RICHARD ROBERTS *v.* JOHN ROBERTS and Others.

THIS was an action of ejectment, brought to recover the possession of a farm called Tyddynsion, in the parish of Aberirch, in the county of Carnarvon; and issue having been joined, by the consent of the attorneys and parties on both sides, and by a Judge's order, the following case was stated for the opinion of this Court:—

words of limitation, and other farms to B., C., and D., respectively, in the same terms; and appointed A. and B. joint executors and *residuary legatees* of his will:—*Held*, that A. took a life estate only in the farm devised to her.

Robert Roberts, the testator hereinafter named, being seised in fee of the hereditaments and premises hereinbefore mentioned, on the 23rd day of September, 1805, duly made and published his last will and testament in writing, executed and attested so as to pass real estates, as follows:—

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“In the name of God, amen. I, Robert Roberts, of &c., do make, publish, and declare this as and for my last will and testament, in manner following, that is to say: In the first place, I will and direct that all my just debts and funeral expenses be fully paid by my executors hereinafter named. [The will then bequeathed several pecuniary and specific legacies, and proceeded thus.] I give, devise, and bequeath to my son Morris Roberts, the farm commonly called and known by the name of New York, in the parish of Llangian, and also the sum of £30, and also four ounces (a) of the sloop or vessel called the Cambria, whereof John Roberts is the captain. I give, devise, and bequeath to my son Robert Roberts, the farm commonly called or known by the name of Tyn-y-flynnon, in the parish of Llangian, and also the sum of £30, and also four ounces of the said sloop or vessel called the Cambria. I give, devise, and bequeath to my son William Roberts, the farm commonly called and known by the name of Dynfre, in the parish of Aberdaron. I give, devise, and bequeath to my daughter Elizabeth Roberts, the farm commonly called and known by the name of Tyddynsion, in the parish of Abereirch. [The will then contained further bequests of pecuniary legacies, and concluded thus:] And I do hereby nominate, constitute, and appoint my son William Roberts, and my daughter Elizabeth Roberts, joint executors and residuary legatees of this my last will and testament,” &c.

The testator's said daughter Elizabeth Roberts, to

(a) That is, $\frac{1}{16}$ th shares.

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whom the said tenement called Tyddynsion was devised in the manner in the said will mentioned, died in January, 1834, leaving a husband and several children her surviving, and having received the rents and profits of the said premises, under the said devise, until her death. The lessor of the plaintiff is the eldest son and heir-at-law of the said Robert Roberts the testator. The defendants are the occupying tenants of the said premises.

The question for the opinion of the Court is, whether the said testator, by his will, disposed of the fee-simple and inheritance in the said tenement called Tyddynsion, or of an estate for life only, to his daughter the said Elizabeth Roberts. If the Court shall be of opinion that the fee-simple estate of the testator passed either by the specific devise to his daughter, the said Elizabeth Roberts, or by the residuary clause, coupled with the charge on the executors to pay the testator's debts, or otherwise by the said will, judgment of *nolle prosequi* shall be entered against the plaintiff: but if the Court shall be of opinion that the reversion of and in the said tenement called Tyddynsion, expectant on the decease of the said Elizabeth Roberts, was undisposed of by the said will, then judgment shall be entered against the defendants by confession, for 1*s.* damages.

R. V. Richards, for the lessor of the plaintiff.—The question is, whether Elizabeth Roberts, under this will, took an estate in fee, or for life only, in the farm called Tyddynsion. There are no words in the will to pass the estate in fee. It is clear that it did not pass by the specific devise, which has no words of limitation. The direction to the executors to pay debts and funeral expenses, being no more than the law itself would imply, will not enlarge the estate into a fee. If, indeed, the devise had been to Elizabeth Roberts, "she paying the debts and funeral expenses," so that they were a charge on her

as devisee, the case would be different. And the clause whereby she is appointed an executor and *residuary legatee*, carries the case no further. The last words are fully satisfied by applying them to personal property, of which it appears by the will that the testator died possessed.

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Welsby, for the defendants.—It must be admitted, that by the devise of Tyddynsion itself a life estate only would pass, the word “farm” being obviously descriptive only of the local character of the property. But it is submitted that the charge on the executors, coupled with the residuary clause, sufficiently shew, that in order to effectuate the general intention of the testator, a fee must be held to have passed to Elizabeth Roberts. In the construction of wills, the precise order of the clauses will be disregarded, in order to give effect to the intention pervading the whole. Here it seems clear that the testator meant to dispose of all his property, as well real as personal. The will may therefore be read as if it ran thus:—“I appoint William Roberts and Elizabeth Roberts my executors and residuary legatees; and direct that all my debts and funeral expenses be paid by them.” That is equivalent to a charge on them in their joint character of executors and residuary legatees. The word “legatee” will be applied, where it is necessary to the reasonable construction of the will, to mean a devisee of real estate (*a*). There are several cases like the present, although not express authorities for the defendants. In *Doe d. Willey v. Holmes* (*b*), the testator devised his house and furniture to A., whom he made executrix, she paying all his debts and legacies: and it was held that A. took a fee in the realty. In *Pitman v. Stevens* (*c*), the words of the will were—“I give and be-

(*a*) *Hardacre v. Nash*, 5 T. R. 716; *Pitman v. Stevens*, 15 East, 505.

(*b*) 8 T. R. 1.
(*c*) 15 East, 505.

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queath all that I shall die possessed of, real and personal, of what nature and kind soever, after my just debts are paid. I appoint P. my residuary legatee and executor." The will expressed also the testator's desire that P., "his legatee and executor," should be kind to another relation, and do something handsome for him at his death. It was held that P. took an estate in fee in the real estate of the testator. In *Doe d. Penwarden v. Gilbert* (a), the will commenced thus:—"As for my temporal estate and effects, I give and dispose of the same in manner following." The will then bequeathed a pecuniary legacy, and devised a particular estate to J. G., without words of limitation; and then proceeded—"and all the rest and residue of my goods and chattels, personal and testamentary effects whatsoever, I give and bequeath to the said J. G., whom I make sole executor of this my will." It was held that, by force of the latter clause, J. G. took a fee in the estate specifically devised to him.—*Doe d. Knott v. Lawton* (b) was also cited.

Richards, in reply, distinguished the cases cited, on the ground that in *Doe v. Holmes* there was an express charge on the devisee as such; and that in *Pitman v. Stevens* and *Doe v. Gilbert*, the testator in terms expressed his intention of disposing of all his estate, both real and personal. *Doe v. Lawton* proceeded on the effect of the word *estate*. Here there was no charge on the devisee in that capacity, and nothing to shew that the testator meant the residuary clause to be applicable to real estate.

LORD ABINGER, C. B.—I have little doubt that the testator thought he had given a fee by each of the several devises contained in his will: if so, he could not intend to

(a) 3 Brod. & B. 85.

(b) 4 Bing. N. C. 455; 6 Scott, 303.

give the fee by the residuary clause. And upon the whole will taken together, I do not think we can infer that he intended to devise the fee by the residuary clause. The cases cited for the defendants have been sufficiently distinguished by Mr. *Richards*. There is another case, of *Doe d. Ashby v. Baines* (a), which has not been cited, that is very like the present, and bears strongly in favour of the lessor of the plaintiff. I am of opinion, therefore, that the plaintiff is entitled to our judgment.

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PARKER, B.—Unless we can see, upon a reasonable construction of the words of the will, enough to take away the estate from the heir at law, it must remain in him. It is very properly conceded, on the part of the defendants, that the devising clause itself is not sufficient to pass the fee; but reliance is placed, first, upon the charge of debts and funeral expenses; but that is only what the law would imply without any such words. Then the only other words relied upon are the concluding words of the will, by which the testator appoints William and Elizabeth Roberts joint executors and residuary legatees of his will. These are words confessedly applying, in their ordinary sense, to personalty only; and I think there is nothing in this will to apply them more largely. In *Pitman v. Stevens*, the words were much stronger: the will began by expressing the testator's intention to dispose of "all that he should die possessed of, real and personal, of what nature and kind soever," and those words were immediately followed by the appointment of Captain Preston as residuary legatee and executor. The whole will, taken together, clearly shewed that the testator meant him to be residuary devisee of all he died possessed of. In *Doe v. Gilbert*, again, the testator first disposed of "all his temporal estate and effects," and then appointed the defend-

(a) 2 C., M., & R. 23.

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ant sole executor and residuary legatee. The words "temporal estate," being sufficient to include his real estate, were coupled with the residuary clause, and clearly evinced his intention to make the defendant residuary legatee of all his real estate. The case last cited, *Doe d. Knott v. Lawton*, is no authority for the defendants. On the whole, I am of opinion that the residuary clause applies to personalty only, and that the heir at law is not disinherited.

ROLFE, B.—I am of the same opinion. No doubt the real intention of the testator was that which has been suggested by my Lord. But as the words of the devise themselves do not carry more than a life estate, the question is, are there any other words in the will which have that effect? Now the first clause, directing the payment by the executors of debts and funeral expenses, is nothing more than the law would imply: they are not charges of that description which have been held to give a fee, on the ground that otherwise the executors would be unable to pay them. And I think it is equally clear that the concluding clause is not sufficient to give an estate in fee to Elizabeth Roberts. The testator never could intend to give separate life-estates to his two children, and then to make them *joint* residuary legatees of his estates in fee.

Judgment for the plaintiff.

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SCHLETTER v. COHEN.

Jan. 20.

OGLE moved for a rule to shew cause why an order of *Rolfe*, B., for the issuing of a *capias* against the defendant, under the 1 & 2 Vict. c. 110, s. 3, should not be rescinded. One of his objections was, that the affidavit on which the order was obtained, (which was sworn before the suing out of the writ of summons), was not entitled in the cause: and he stated that it had been ruled by several of the judges at chambers that this was an irregularity.

Where an order is obtained for a *capias* under the 1 & 2 Vict. c. 110, s. 3, before the suing out of the writ of summons, the affidavit on which it is applied for need not be entitled in the cause.

LORD ABINGER, C. B.—That is no objection. There was some little doubt on the matter at first, because of the word “plaintiff” in the statute; but the point came under the consideration of the Judges, and they came to the conclusion that it ought to have the same meaning as in the stat. 12 Geo. 1, c. 29, where the same word is used to signify a party who intends to become plaintiff, and with that view makes an affidavit to hold to bail.

PARKE, B.—If this objection be a good one, I have made hundreds of orders that are erroneous. It is otherwise where a writ has been issued, because then there is a cause in Court; but when no writ has yet been sued out, the affidavit need not be entitled in the cause; and it is quite clear that an affidavit to hold to bail under the statute may be made before a writ is sued out. The contrary doctrine would be attended with much inconvenience: parties residing at a distance could hardly ever arrest the defendant, because they must first send up to London to sue out the writ, and then entitle and swear the affidavit.

GURNEY, B., concurred.

Rule refused.

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In the matter of the Estate and Effects of PHILIP COALES,
deceased.

Jan. 22.

A., a British subject, domiciled in England, made his will and died in England, and by his will disposed of certain government notes of the East India Company, issued at Calcutta, and the amount of which was receivable only under an Indian probate; and appointed an English executor. The executor executed a power of attorney to S. in India, who thereupon obtained letters of administration with the will annexed in India, under which he received the amount of the notes, and remitted to the executor in England, who paid it over to the legatees:—*Held*, that legacy duty was payable thereon.

IN this case the usual order had been obtained under the stat. 42 Geo. 3, c. 99, s. 2, calling upon the executors of John Dyneley, deceased, who was the surviving executor of Philip Coales, deceased, to shew cause why they should not deliver an account of the legacies and property of the said Philip Coales, and pay the legacy duties.

Affidavits were filed in opposition to the rule, which stated, that the said Philip Coales, at the time of his decease, was possessed of certain notes called government notes of the East India Company, issued by the directors at their public treasury at Fort William, in Bengal, which were purchased by him while resident in the East Indies; that these notes were not redeemable or payable by the East India Company until in or after the year 1836; and that the amount of them, when so payable, could not have been received by the said John Dyneley, as executor of the said Philip Coales, under the probate granted by the Prerogative Court of Canterbury, nor without his going himself to India, and procuring a probate to be granted by the Supreme Court of Judicature at Fort William, or without letters of administration with the will annexed being granted by that Court. That in the year 1836, letters of administration within the province and jurisdiction of the Supreme Court, to be administered with the will of the said Philip Coales annexed, were granted by the Supreme Court to William Speir, of Fort William, merchant, (acting under a power of attorney from Mr. Dyneley); and he, under and by virtue of such letters of administration, received the proceeds of the said government notes at Fort William; and that, excepting the money so received by him as such administrator, the account already delivered

by the executor contained a full and true account of all the legacies and property to be administered under the will. The affidavit stated also, that an account had subsequently been delivered by the executors to the commissioners, under protest, of all the property of the deceased received from India (the produce of the notes), and that no other personal estate was outstanding; but that they had declined paying legacy duty thereon, being advised that it was not legally chargeable. The deponent also stated, that he had been informed and verily believed that the said Philip Coales was not a native of Great Britain, nor of any place within the dominions of the British crown.

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R. V. Richards shewed cause.—The question is, whether under the circumstances disclosed in these affidavits, that part of the estate of Mr. Coales, which was at the time of his death in India, and was not recoverable under a probate from the Prerogative Court here, is liable to legacy duty. This application is made under the stat. 36 Geo. 3, c. 32, the second section of which imposes the duty on “every legacy, specific or pecuniary, or of any other description, of the amount or value of £20 or more, given by any will or testamentary instrument of any person who shall die after the passing of this act, out of the personal estate of the person so dying,” &c. Then the 7th section defines what shall be deemed a legacy, viz.:—“every gift by any will or testamentary instrument, which shall, by virtue of such will or testamentary instrument, have effect or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of, shall be deemed and taken to be a legacy within the meaning of this act, whether the same shall be given by way of annuity or in any other form,” &c. &c. This act has of late years received a more restricted construction than formerly, but among

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the decided cases on this subject, there is none which directly bears upon the facts now before the Court. This is the case of a testator who was not a native of Great Britain, or of any place within the British dominions. [*Gurney, B.*—I presume he was domiciled in England.] No doubt he died in England; and it must be assumed, although that does not expressly appear upon the affidavits, that though not a native of this country, he was domiciled here. But although that was so, this property was so situated that the executor in England had no power or control over it in his character of executor; and although Mr. Speir, having received it as administrator in India, remitted it to the executor here, that was altogether unnecessary; he had entire control and dominion over the property, and might have remitted it directly to the legatees: and the mere circumstance of the money having been remitted through the executor here, as the channel of communication, can have no effect on the liability to legacy duty.

In the case of the *Attorney-General v. Cockerell (a)*, legacies bequeathed by a British subject, resident in the East Indies, out of his personal estate, to persons living in England, were held to be liable to duty, if the executor proved the will in England and paid the legacies here, notwithstanding the testator realized and possessed his property in India, resided there, made his will there, and died there; and although the executors were in India at the time of their appointment, and the will was originally proved there. That case, however, with others of the same class (*b*), has been overruled; and it is now clear that in the case of a testator dying under the circumstances mentioned in the *Attorney-General v. Cockerell*, although the will be afterwards proved in England, legacy duty is not

(a) 1 Price, 165.

(b) *Attorney-General v. Beat-*

son, 7 Price, 560; *Logan v. Fairlie*,

2 Sim. & Stu. 284.

payable: *Attorney-General v. Jackson* (a), *Arnold v. Arnold* (b). In that case the Lord Chancellor says—"The fact relied upon as subjecting the legacies to the duty, is that the property was remitted from India to England, and administered by the executors in this country. This was an unnecessary proceeding; it may be said, indeed, to be by mere accident that such a course was adopted, for it is obvious that, the executors in India having paid all the debts in India, and the executors in England having paid all the debts in this country, the former might, according to all the authorities, have avoided the question by remitting the legacies direct to each legatee; or, instead of allowing them to pass through the hands of the personal representatives in this country, might have remitted them to an agent of their own, with directions to pay over the money to the person entitled." The same observations apply to the present case. [*Parke, B.*—Here Mr. Speir was acting under a power of attorney from Mr. Dyneley, and was merely his agent.] There was nothing to have compelled the Court to grant the administration to the party named by the executor; but they having so granted it, he has all the duties of a regular administrator personally imposed upon him. It is an absolute, not a qualified, grant of administration to Mr. Speir. The judgment of the Court in *Arnold v. Arnold* proceeds upon the ground, not that the testator had been domiciled in India, but that the property was in India, and was not tangible by the executor here as an executor, but that there was another party in India who had the absolute control over the property there, and over whom the ecclesiastical Courts here could have no jurisdiction. His Lordship says:—"When the act speaks of 'any will of any person,' and of the legacies being payable out of the personal estate, it must, I think,

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(a) 2 C. & J. 101; 8 Bligh, 15.

(b) 2 Myl. & Cr. 256.

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be considered as speaking of persons, and wills, and personal estates in this country, that being the limit of the sphere of the enactment. It is clearly not applicable to the East Indies: it is applicable to this country. If there had been no property in this country, it would not have been necessary to prove the will here, quoad the property in India." In that case the testator certainly died in India; in the present case, not being a native of this country, he died here: but the judgment of the Lord Chancellor appears to proceed independently of any distinction in that respect, and upon the ground that this is property over which the executor in England had no control. In the case *In re Ewin* (a), where a testator, domiciled in England, died possessed of property in foreign funds payable abroad, but it appeared that the stock had been transferred into the name of the executor in England, and he had dealt with and transferred the dividends to the legatees, the duty was held to be payable. But there the executor in England received the property without proving the will abroad, and had the means of controlling the property in his character of executor here. Here there was an absence of all power in the executor in England to deal with this property, which was altogether under the control of the administrator in India. Upon the whole, therefore, it is submitted that legacy duty is not payable upon the proceeds of these notes, and that a sufficient account has been delivered by the executors.

The *Attorney-General* and *Waddington*, *contra*, were stopped by the Court.

PARKE, B.—It seems to me, that upon the authority of the very case upon which Mr. *Richards* relies, Mr. *Dyneley*, as the executor, is liable to pay this legacy duty: because

(a) 1 Cr. & J. 151; 1 Tyr. 92.

this is a case, not merely of the payment of the legacy by an English executor in England, which, according to the case of the *Attorney-General v. Beatson*, would have been sufficient to make the legacy duty payable. That authority cannot certainly be considered as any longer binding, after what was decided by the Lord Chancellor in *Arnold v. Arnold*; but in *Arnold v. Arnold* it appears clearly to have been the Lord Chancellor's opinion, that if the testator had been such a person as is described in the act of Parliament, the duty would have been payable; and the ground upon which it was held not to be payable in that case was, that the testator was not domiciled in England, but in India; and that the will of the testator was made in India. But in this case, not only is the legacy payable in England by Mr. Dyneley, but the will is the will of a British subject; at least, if that be material, we ought to assume it to be so, inasmuch as the contrary has not been proved: at all events, it is the will of a person domiciled in England; and according to the case of *In re Ewin*, a person so domiciled fills the character of "a person" described in the act of Parliament. Therefore we have in this case all that the Lord Chancellor, in the case of *Arnold v. Arnold*, seems to think necessary in order to make the duty payable. We have first the fact that the testator was a British subject, or a person domiciled in England; and next, that the will was made in England, and administered in England by an English executor. It seems to me, therefore, that there is no doubt, even according to the authority of the case which was relied upon by Mr. *Richards* as overruling former decisions of this Court, that the legacy duty is payable in this case.

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ALDERSON, B.—I am of the same opinion. In the case of *Arnold v. Arnold*, the Lord Chancellor puts his judgment upon the ground, that when the act speaks of "any will of any person," it must mean the will of a testator in

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this country, and a will in this country. In this case the existence of a will in this country is proved, and the money has been remitted to the executor under the will, in this country, to be paid by him to the legatees under the will. It seems to me that the case falls within the authority of *Arnold v. Arnold*.

GURNEY, B.—I cannot see that the circumstance of Mr. Speir being employed to remit the funds from India makes any difference in the case: he acted under a power from the executor Mr. Dyneley; he was his agent, receiving authority from him, and transmitting the funds to him as the executor in this country.

ROLFE, B.—I am quite of the same opinion. I think, so far from the funds being received by Mr. Speir as executor, that Mr. Dyneley was not compelled to send out a power of attorney to him to administer the assets, although he would have been compelled to send out such a power as would have enabled his agent to remit the funds. There may be cases of difficulty which may sometimes arise, of a foreigner abroad having property here; but this is a case which appears to me to be free from any doubt whatever.

Rule absolute.

WESTON v. WRIGHT.

Jan. 22.

Where A. the charterer of a vessel, by the charterparty,

agreed that on the arrival of the ship at the outward port, he would, through his agent there, supply cash to the master for the disbursements of the vessel, to be repaid by bills to be drawn by the master on the owner: and, on the arrival of the vessel there, the agent supplied goods for the use of the crew, and paid certain money demands made on the master, but did not advance any actual cash:—*Held*, that although it was not shewn that any bills were drawn by the master for the amount, A. might recover it from the owner in an action for goods sold and delivered and for money paid, the master having authority to obtain supplies of goods and money for the necessary use of the ship on the credit of the owner, independently of the express stipulation of the charterparty.

ASSUMPSIT for goods sold and delivered, money lent, money paid, and on an account stated. Plea, non assump-

sit. At the trial before *Rolfe*, B., at the Middlesex Sittings in this term, it appeared that the plaintiff had chartered a vessel belonging to the defendant, bound for the African coast, and the charterparty contained an express stipulation, that on the arrival of the ship at Sierra Leone, the plaintiff would, through his agent there, supply cash to the master for the disbursements of the vessel, to be repaid by bills to be drawn by the master on the defendant. On the arrival of the ship at that port, in August 1839, the plaintiff's agent there supplied her with goods, and also paid certain demands made upon the master in respect of the vessel by persons resident there; but he did not advance any actual cash. There was no evidence to shew whether any bill had been drawn by the master for the amount. It was objected for the defendant, that the plaintiff ought to have sued upon the special agreement contained in the charterparty, and could not recover in this general form of action. The learned Judge reserved the point, and a verdict passed for the plaintiff, damages 218*l.* 10*s.*

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Jervis now moved to enter a nonsuit, pursuant to leave reserved at the trial.—The plaintiff ought to have sued on the special contract. It is clear this was not a case of goods sold and delivered, to be paid for on request; nor was it a case of money paid or money lent. The contract was to supply cash, to be repaid in a particular manner, by bills at a certain date. It is perfectly consistent with the evidence, that a bill was drawn by the master in respect of this transaction, and remitted to and accepted by the defendant. If the plaintiff had produced the bill, and shewn that the time for which it was drawn had expired, or that it had not been honoured, the case would be different. But further, there was no advance *in cash* at all, and the plaintiff, therefore, did not come within the terms of the agreement. [*Parke*, B.—The plaintiff's title to recover for goods sold depends upon the general authority of the

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master to contract for necessaries for the ship]. That would apply, if there had been no special provision to the contrary; but as there was, the defendant can only be sued in the terms of the engagement contained in the charterparty, for cash advanced thereon.

PARKE, B.—I think there should be no rule. With respect to the money demands in the declaration, it appears, that although, according to the agreement, the money was to be paid by bills to be drawn by the captain upon the owner, yet no time was specified for which credit was to be given. It must, however, have meant bills payable at sight, or at all events within a reasonable time: at the expiration of that time, the defendant becomes indebted in so much money payable on request. Then as to the count for goods sold, the defendant stands in the same position as an ordinary merchant, to whom goods have been bonâ fide supplied for the service of his ship, and for which the plaintiff may recover, unless he has restrained himself by the charterparty from so doing: and I am clearly of opinion that he has not. It contains an affirmative provision, by which the plaintiff is bound to supply money to the master, but that is perfectly consistent with the general authority of the master to pledge the credit of his owner for necessaries to the ship.

ALDERSON, B.—By the agreement contained in the charterparty, the plaintiff has undertaken that the master shall have money in hand if he require it, and the right himself to go into the market and get goods, should they be needed. But that engagement is perfectly consistent with the general right which the master has by law, of pledging the credit of his owner for necessaries supplied to the ship, and both may well stand together. As to the money advanced to others, for the protection of the ship, it must be considered as advanced to the owner;

or if not, it may be considered as a necessary supplied to the master; and we have recently decided, that when so advanced, it may be recovered against the owner, in the same manner as in the case of a supply of goods (a).

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GURNEY, B., and ROLFE, B., concurred.

Rule refused.

(a) *Arthur v. Barton*, 6 M. & W. 138.

ROBERTS v. HUGHES.

THIS was an action tried before the under-sheriff of Merionethshire, in which the plaintiff had a verdict for 15*l.* 6*s.* *Jervis* had obtained a rule nisi to enter a verdict for the defendant, or for a new trial, on the ground that the verdict had been entered for the plaintiff by a mistake of the under-sheriff.

Jan. 25th.
Affidavits of
jurors as to
what took place
in open court
on the delivery
of their verdict,
are receivable.

R. F. Richards, in shewing cause, proposed to read an affidavit of one of the jurors, as to what had passed on the delivery of their verdict.

Jervis objected: but

PER CURIAM.—The rule does not exclude jurymen from swearing to what took place in open Court, but only as to what took place in their private room, or the grounds on which they found their verdict.

The affidavit was accordingly read: and ultimately the rule was made absolute for a new trial.

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MORGAN v. THORNE.

Jan. 12th.

On the 27th of June, 1840, a plaintiff in trespass obtained a verdict with 1s. damages, leave being reserved to the defendant to move to enter a nonsuit. The Judge, on being applied to certify under 43 Eliz. c. 6, s. 2, to deprive the plaintiff of costs, declined doing so until the motion for a nonsuit should have been disposed of. On the 3rd of July following, the statute 3 & 4 Vict. c. 24, came into operation. No motion for a nonsuit having been made, the Judge, on the 9th of November, granted the certificate:—*Held*, that the certificate was null and void.

The wife of a minor having committed adultery whilst her husband was abroad in the East Indies,

the father procured himself to be appointed prochein amy, and commenced an action for crim. con. in his son's name, without his knowledge or authority, and recovered a verdict. On motion to set aside the proceedings, on the ground of there being no authority from the son to bring the action:—*Held, first*, that as the defendant had reason to believe long before the trial, that the authority of the son could not have been obtained, he ought to have made inquiries then, and that the application was now too late. *Secondly*, that no authority from the son was necessary to enable the father to sue as prochein amy; and there being nothing to shew that he was not properly appointed prochein amy, that it must be assumed to have been properly done, and that the son would be bound by the judgment in this action.

THIS was an action of trespass brought by the plaintiff, as prochein amy, against the defendant, for criminal conversation with his son's wife. The cause was tried before Lord Abinger, C. B., on the 27th of June last, at the Middlesex Sittings after Trinity Term, when the plaintiff recovered a verdict with 1s. damages, leave being reserved to the defendant to move to enter a nonsuit. Upon the verdict being returned, the Lord Chief Baron was applied to to certify to deprive the plaintiff of costs under the 43 Eliz. c. 6, s. 2, but he declined to do so until the motion for a nonsuit had been disposed of. On the 3rd of July following, the statute 3 & 4 Vict. c. 24, came into operation. That statute, after reciting the 43 Eliz. c. 6, and 22 & 23 Car. 2, by sect. 1 enacts, "that the said recited act of the 43rd of Elizabeth, so far as it relates to costs in actions of trespass and trespass on the case, and so much of the 22 & 23 Car. 2 as relates to costs in personal actions, be and the same are hereby repealed." And it enacts by sect. 2, "that if the plaintiff, in any action of trespass or of trespass on the case, brought or to be brought in any of her Majesty's Courts at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Common Pleas at Durham, shall recover by the verdict of a jury less damages than 40s., such plaintiff shall not be entitled to recover or obtain from the defendant, in respect of such verdict, any

costs whatever, whether it should be given upon any issue or issues tried, or judgment shall have passed by default, unless the Judge or presiding officer before whom such verdict shall be obtained, shall *immediately afterwards* certify on the back of the record, or on the writ of trial, or writ of inquiry, that the action was really brought to try a right, besides the mere right to recover damages for the trespass or grievance for which the action shall have been brought, or that the trespass or grievance, in respect of which the action was brought, was wilful and malicious." No motion for a nonsuit having been made, his Lordship, on the 9th of November, granted the certificate prayed for. In Michaelmas Term, *Bayley* obtained a rule calling upon the defendant to shew cause why the Master should not tax the plaintiff his costs, notwithstanding the certificate: against which

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C. C. Jones now shewed cause.—The stat. 3 & 4 Vict. c. 24, did not come into operation until after the cause was tried and the certificate was applied for; and therefore the stat. 43 Eliz. c. 6, was still in force. The certificate, when granted, must have a retrospective operation, and must be considered as granted at the time of the trial, and it is therefore effectual for the purpose of depriving the plaintiff of costs. [*Parke*, B.—If the certificate were granted at any time before the costs were allowed by the Court, it would be sufficient under the statute of Elizabeth.]

Bayley, in support of the rule.—The certificate was not granted until after the statute of Elizabeth had been repealed, and therefore the power given by that statute to deprive the plaintiff of costs did not exist after the statute 3 & 4 Vict. c. 24, came into operation. The effect of a repealing statute is correctly stated by *Tindal*, C. J., in *Kay v. Goodwin* (a). His Lordship there says, "I take the

(a) 6 Bing. 576; 4 M. & P. 341.

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effect of repealing a statute to be, to obliterate it as completely from the records of Parliament as if it had never passed; and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law." This action was clearly not concluded whilst the 2nd section of the 43 Eliz. c. 6, was an existing law, as no judgment has yet been signed. [*Parke, B.*—The case of *Charrington v. Meatheringham* (a) is an authority in point. There the plaintiff sued parish officers for an act done under 13 Geo. 3, c. 78, (which gave treble costs on a nonsuit, to parties sued for anything done in pursuance of that act), and was nonsuited at a trial which took place before the 5 & 6 Will. 4, c. 50, which repealed the former statute, came into operation, but judgment was not signed until after; and this Court held that the defendants were not entitled to treble costs.]

Jones then applied for leave to move to enter a nonsuit, upon an affidavit stating that the defendant had abstained from doing so in the belief that the certificate would be granted if no motion were made. He contended, that if the certificate turned out to be of no avail, the defendant ought to be placed in the same situation as he would have been if the certificate had not been granted.

Lord ABINGER, C. B.—If the certificate had been granted during the sittings, it would probably have been good, notwithstanding the 2nd section of the statute 43 Eliz. c. 6, has been repealed; because I should have thought the sittings might, for this purpose, be considered as one-day. But the effect of this statute being entirely to repeal the 43 Eliz., and to take away every power which the Judges had under it, this certificate is void, and cannot operate to deprive the plaintiff of costs.

(a) 2 M. & W. 228.

PARKER, B.—The former act having been repealed, the certificate is null and void. *Esch. of Pleas, 1841.*

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The rest of the Court concurred.

Rule absolute.

On a subsequent day, a rule was obtained by *Kelly*, calling upon the plaintiff to shew cause why the proceedings in the action should not be set aside with costs, on the ground that the action had been brought by the father of the minor, as his prochein amy, without his consent or knowledge. It appeared, that at the time he was appointed prochein amy, the son was in India, and could know nothing of the proceedings instituted by his father.

Thesiger and *Bayley* shewed cause.—First, this application was too late. The defendant had no right to wait until step after step had been taken in the cause, and the cause tried, and then seek to set the proceedings aside because the action was not authorized by the plaintiff. He ought to have applied to the Court within a reasonable time after he knew that the plaintiff was in India, and could have given no authority to bring the action: he was cognisant of that fact on the 29th of May last, and ought then to have applied to a Judge to stay or set aside the proceedings, and not to have allowed the plaintiff to go on and incur further expense. The application was therefore out of time. But, secondly, the objection on which the rule was granted cannot be sustained. There are a variety of cases in which an action may be brought by a father in the name of his child, without his consent, where from his tender age he is not competent to give authority for that purpose. Suppose the case of a personal injury

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to a child, the action must of necessity be brought by the father or other next friend or relative of his own authority, otherwise the remedy would be wholly lost. For instance, if after such a marriage the son became a lunatic, and the wife committed adultery, and had a son by the adulterer, would not the father be entitled to interpose for the purpose of preventing the illegitimate issue from inheriting his estate? A *procchein amy* is liable for all the costs, he is not a competent witness for the plaintiff, his declarations are evidence for the defendant, and he is in almost all respects the real plaintiff on the record. In *Andrews v. Cradock (a)*, it is said—"Any one may bring a bill as *procchein amy* to an infant without his consent, because it is at his peril that he brings it to be answerable for the event; but none can bring a bill in the name of a *feme covert* as her *procchein amy*, without her consent; and if such a bill be brought, upon her affidavit of the matter it will be dismissed." There is no case where a *procchein amy* having been regularly appointed by the Court, the proceedings have been set aside because the son had given no authority to bring the action. But, at all events, if previous consent were necessary, a subsequent ratification of his father's act is equivalent to it, and would render his act valid; and there has been such a ratification in the present case. On the 1st of September, 1840, the son, being still in the East Indies, by deed, reciting that certain proceedings had been already had and taken on his behalf, ratified and confirmed the same, and appointed his father his proxy to appear to a suit in the Ecclesiastical Court. That was a sufficient acquiescence, if any were necessary. But the defendant should have objected to the appointment of the father as *procchein amy* by moving to set it aside, at least as soon as he knew, from his being at the

(a) 1 Eq. Ca. Abr. 72.

time in the East Indies, that the son's express authority could not have been obtained. *Exch. of Pleas, 1841.*

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Kelly, in support of the rule.—The legal principle on which the defendant has a right to call upon the Court to set aside the proceedings, has been lost sight of in the argument on the other side. That principle is, that if the action has been commenced in the name of a party, but without his authority or consent, although judgment be obtained by the plaintiff on the record, the party really entitled is not bound thereby, and may at any time bring a fresh action. [*Parke*, B.—Have you any authority for that position, where a prochein amy has been appointed by the Court?] Perhaps not; but if the plaintiff came to England, there would be nothing to prevent him from bringing an action for crim. con., since the defendant could not set up the recovery in this action as a defence, as it was brought without the plaintiff's authority. [*Alderson*, B.—Is it not clear that the appointment of a prochein amy is in the discretion of the Court, in the same way as the appointment of a guardian by the Court of Chancery? By the stat. Westm. 2, c. 15, "In every case in which persons within age may sue, it is ordered that if such minors be eloined, so that they are less able to sue personally, their next friend shall be admitted to sue for them."] If the prochein amy had been appointed by the Court with a full knowledge of the circumstances, the case might have been different. This is very different from the case put of a personal injury to a child; for if an infant be incapable of exercising any judgment or discretion in the matter, the Court would appoint a prochein amy for him, to prevent the remedy from being lost: but this action, from its very nature, implies an injury to the mind of the plaintiff, and shews that he is a person capable of exercising a judgment and discretion; and when he returns to this country, he may disavow the act of his father, and commence a fresh action.

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[*Alderson*, B.—In *Fitzh. N. B. 27*, (J), it is said, “A man shall not answer as guardian unto an infant who is plaintiff or defendant without a warrant, but as *prochein amy* to an infant he shall sue an action without warrant.” And it is added, “The infant shall not remove his guardian, nor disavow an action sued for him by *prochein amy*.” *Parke*, B.—That authority shews, that if a second action were brought, the appointment of a *prochein amy*, and the recovery in the former action, would be an answer to the second, as long, at all events, as the appointment of *prochein amy* remains unrevoked. Whether the case is that of a guardian or *prochein amy*, the principle is the same when once they are admitted by the Court: *Simpson v. Jackson* (a). *Alderson*, B.—In 2 *Inst. 261*, Lord Coke, in his commentary on the stat. of Westminster the 1st., says, “The names of guardian and *prochein amy* are sometimes taken the one for the other; because the guardian and *prochein amy* are oftentimes all one, as the guardian in socage is also *prochein amy*, &c. And now as well the guardian as the *prochein amy* are allowed by the Judges to be some of the officers of the Court, and both in respect of their place and skill, are in truth the best *prochein amys* for the good and furtherance of the infant’s cause.”] The question whether the appointment be valid or not, depends upon the circumstances under which the order has been made; and if it turns out that it has been made upon a suggestion of that which is false, or upon a suppression of the truth, the Court will set it aside. It is true this is not an application on behalf of the infant; but he may apply immediately on his return, and if the Court did set aside the appointment, then there would be nothing to prevent him from bringing a fresh action. If the proceedings are in such a state that the plaintiff may put himself in a situation to commence another ac-

(a) *Cro. Jac.* 640.

tion, it is within the principle of the case of *Robson v. Eaton* (a). There it was held, that where a party paid a debt to the attorney of a person suing in the name of the creditor, but without the creditor's authority, the debtor was compellable to pay the creditor again. That case is like the present, as the same thing might happen here; the only difference is, that here the plaintiff, instead of suing by attorney, is suing by *procureur*. [Parke, B.—That makes all the difference: an attorney is appointed by the party; but a *procureur* is appointed by the Court.] This order should not have been made without a petition on the part of the infant; and if it was, then he is not bound by it, and is remitted to his original rights. As to the delay, if the defendant is entitled to set aside the proceedings, his coming too late can only be a question of costs. But there has been no improper delay in this case; for the fact stated in the affidavit, that the defendant knew the plaintiff was in India, was consistent with a belief on his part that the father had written to his son and obtained his authority; and the affidavits in answer state that the defendant did not know, until very recently, that the action was brought without the son's authority.

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PARKE, B.—I am of opinion that this rule ought to be discharged. If, in order to give the defendant in this case a valid discharge from the payment of the sum recovered, it were necessary to prove this action either to have been commenced with the authority of the plaintiff, or to have received a subsequent ratification by him, no such authority or ratification has been shewn in this case, nor has it been shewn that he knew of the action at all. But still there would be great weight in the argument, that this objection, taken as it is in this stage of the cause, comes too late; for it appears that, on the 29th of May, the de-

a) 1 T. R. 62.

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fendant had intimation of the above facts, which was sufficient to have put him on inquiring whether an authority had been given or not; and comparing the time when the adultery was charged to have been committed with the fact that the plaintiff was at that time in the East Indies, he might have had reason to suspect that no such authority had been given. But it seems to me, that the *prochein amy* in this case did not stand in need of any authority from the infant to sue in his name; nor can I distinguish it from any other case in which this mode of suing is adopted. The actual form of the application made by the plaintiff to sue by his *prochein amy* has not been brought before us, but we must presume it to have been in the ordinary form; for if there had been either fraud or mistake in the transaction, the fact should have been made to appear by affidavit. Assuming, therefore, every thing to have been regularly done, then comes the objection made by Mr. *Kelly*, that if the defendant had paid the damages awarded by the jury, he might, on the plaintiff's coming of age, be compelled to pay them over again, on the ground that the discharge of the *prochein amy* was the discharge of a person who had no authority to give one; which is an objection applicable to every case where an infant sues by his *prochein amy*. The law knows of no distinction between infants of tender and of mature years; and as no special authority to sue is requisite in the case of an infant just born, so none is requisite from an infant on the very eve of attaining his majority. It appears perfectly clear that every *prochein amy* is to be considered as an officer of the Court, specially appointed by them to look after the interests of the infant, on whom the judgment in the action is consequently binding, and who cannot be allowed, on attaining his age, to commence fresh proceedings founded on the same cause of action; so that the defendant, in this and all similar cases, is perfectly safe in paying the damages recovered. Supposing there to have been

either fraud, or anything special in the case, to make it the ground of application to the Court, we will only say, that when the parties come forward to protect their own rights, we will deal with the case brought before us; but in a common and ordinary case like the present, there is no ground to call for our interference.

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ALDERSON, B.—I am of the same opinion. We have nothing to do at present with the question, whether the infant has appointed his *procchein amy* or not; nor is that a matter with which the defendant has anything to do; if he had, the same arguments might be urged in any case of an action brought in the name of a child of three years old, on whom an attack has been made, and on whom personal injury has been inflicted; such a child, it is manifest, cannot so much as know what an action is, much less give authority to institute one. The truth is, that cases of this nature fall within the equity of the statute of Westminster 1st., 3 Ed. 1, c. 48, which gives an infant the right to sue by his *procchein amy* against his guardian in chivalry, who shall have aliened any portion of the inheritance of the infant. By analogy to this, in all cases where a party cannot sue for himself, the Court employs a *procchein amy* as its officer to conduct the suit for him, and no appointment or subsequent confirmation by the party is requisite. It is, in fact, almost the same thing as appointing an attorney; the law, if we may so speak, appoints an attorney to act on behalf of the infant. But even if it were requisite for the *procchein amy* to be appointed by the infant, it is clear that the objection to the want of such authority comes too late.

GURNEY, B., concurred.

ROLFE, B.—If Mr. *Kelly* had succeeded in making out his proposition, then the recovery in this action would not

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be a bar to another at the suit of the son. But he has not shewn that the father was not properly appointed prochein amy. He has likened the case to that of a party suing by attorney in the ordinary mode, and has referred to an authority to shew, that where an action is commenced against a debtor in the name of a creditor, without the authority of the latter, the debtor may be compelled to pay the money again. But the judgment in that case proceeded on the ground that the person represented on the record as the attorney of the creditor, had never in fact been appointed attorney: but here it is not shewn that the plaintiff has not been duly appointed prochein amy. If that had appeared, the cases would have been parallel.

Rule discharged.

JARVIS v. WILKINS.

Jan. 12.

An instrument was in the following terms—
"I undertake to pay to R. I. the sum of 6*l.* 4*s.* for a suit of, ordered by D. P.:"—*Held*, that it was not a promissory note; but good as a guarantee, as the consideration could be collected by necessary inference from the instrument itself.

ASSUMPSIT on a guarantee, with counts for goods sold and delivered, and on an account stated. At the trial before the under-sheriff of Middlesex, the following document was proved by the plaintiff:—

"September 11th, 1839.—I undertake to pay to Mr. Robert Jarvis the sum of 6*l.* 4*s.*, for a suit of, ordered by Daniel Page.

"S. W. WILKINS."

It appeared that the goods in question were a suit of clothes, which had been furnished to Page subsequently to the giving of the above undertaking. The plaintiff obtained a verdict for 6*l.* 4*s.*, leave being reserved to the defendant to move to enter a nonsuit, in case the Court should be of opinion that the instrument was not a guarantee, but a promissory note which required a stamp.

A rule was accordingly obtained in Michaelmas Term last, *Exch. of Pleas*,
against which 1841.

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C. C. Jones appeared to shew cause, but the Court called upon

Thomas to support the rule.—The instrument in question is a promissory note, and not a guarantee; but even if it be a guarantee, it states no consideration on the face of it, and is therefore invalid. It is, however, a promissory note. It is not necessary to state when it is payable; because, if no period be stated, it is payable on demand. In *Ellis v. Mason* (a) an instrument in the following form was held to be a promissory note:—"John Mason, 14th of February, 1836, borrowed of Mary Ann Mason, his sister, the sum of £14 in cash as per loan, in promise of payment, of which I am truly thankful for." In *Brooks v. Elkins* (b), this Court said, that to constitute a promissory note no particular form of words was requisite. [Lord Abinger, C. B.—This is a memorandum, that if the plaintiff will sell Page clothes, he, the defendant, will pay for them. If it had been that he would pay for clothes *before supplied*, it might have been different. It is only a conditional promise.] *Thomas* also cited *Wheatley v. Williams* (c), and contended that if the instrument was not a promissory note, it was void as a guarantee, no consideration being expressed on the face of it.

LORD ABINGER, C. B.—I am of opinion that there is nothing in this objection. The cases which have been cited were all of them cases where the consideration was executed, and therefore the written promise to pay the debt amounted to a promissory note; but in this case it appears

(a) 7 Dowl. 598.

(b) 2 M. & W. 74.

(c) 1 M. & W. 533.

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from the instrument itself, that the promise was made in contemplation of a sale of goods to be afterwards made; and it is a written undertaking, that if the plaintiff will supply the goods "ordered," the defendant will pay for them. It is a memorandum of guarantee for the sale of goods, not a promissory note, and requires no stamp.

PARKE, B.—I am of the same opinion. If the memorandum contained only a promise to pay 6*l.* 4*s.* for goods already supplied, it would be a promissory note, and would require a stamp; but the introduction of the word "ordered" makes all the difference, as it shews that it is a promise to pay for goods if supplied, but which were not then delivered. We are therefore enabled to collect from the instrument itself, that the consideration for the promise was not an executed consideration, but the future delivery of goods already ordered. No objection has been made that the contract varies from that declared upon; and the only questions are, first, is this a promissory note?—I think it is not, for the reasons I have already stated: and secondly, if not a promissory note, is it a binding guarantee? The rule is now perfectly settled, that the consideration must appear upon the face of the instrument itself, either in express terms, or by necessary implication. I think in this case the consideration may be collected by necessary inference, and therefore that the instrument is a binding guarantee.

The other Barons concurred.

Rule discharged.

Exch. of Pleas,
1841.SLATER *v.* HAMES.*Jan. 12.*

THIS was a rule calling upon one J. White, an officer of the sheriff of Lincolnshire, to shew cause why he should not refund the residue of the proceeds of certain goods seized under a writ of *fi. fa.* issued at the suit of the plaintiff, after deducting the amount indorsed on the writ and all legal charges and expenses, and why an attachment should not issue against him for taking and demanding greater fees than those allowed by law, or by the table of fees framed under the stat. 7 Will. 4 & 1 Vict. c. 55; and why he should not pay the costs of the application.

A sheriff, on making a levy under an execution, is only entitled to his poundage under 29 Eliz. c. 4, and to such fees as are allowed by the table of fees framed under 7 Will. 4 & 1 Vict. c. 55; and although he be put to extra trouble and expense in making the levy, he cannot claim more.

It appeared from the affidavits on which the rule had been obtained, that the defendant's goods had been seized by an officer of the sheriff of Lincolnshire, under a writ of *fi. fa.* issued at the suit of the plaintiff, and indorsed to levy 33*l.* 17*s.* The goods were afterwards sold by public auction, except one chair, which was sold by private contract for 3*s.* A pig of the value of 1*l.* 5*s.* was lost or strayed from the possession of the sheriff. The proceeds of the sale, including the chair, amounted to 44*l.* 13*s.* 7*d.*, being 10*l.* 16*s.* 7*d.* more than the sum indorsed on the writ. That money was retained by the sheriff's officer, and a statement was made by him that he was short of his levy £5; he also refused to account for the pig which had been lost.

It appeared from the affidavit in answer, made by the sheriff's officer, that he claimed 1*s.* interest on the levy for fourteen days, £1 for the writ, and 2*l.* 0*s.* 10*d.* for sheriff's poundage and warrant, making together, with the levy, 36*l.* 18*s.* 10*d.*, to which sum no objection was made. The residue was claimed for sundry incidental expenses, not allowed by the schedule of fees, some of which were occasioned by precautions taken to prevent a rescue, others by the employment of carpenters in the removal of the

Exch. of Pleas, goods for sale, and for travelling expenses, commission on
1841. sale by auction, &c.

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Humfrey now shewed cause.—This is an application made under the recent act 7 Will. 4 & 1 Vict. c. 55, which enacts by sect. 2, that from and after the passing of that act, “it shall be lawful for sheriffs or their officers concerned in the execution of process directed to sheriffs, to demand, take, and receive such fees, and no more, as shall from time to time be allowed by any officer of the several Courts of law at Westminster, charged with the duty of taxing costs, under the sanction and authority of the Judges of the said Courts respectively.” And by s. 3 it is provided, that any sheriff or officer taking more than is allowed by the Court, shall be adjudged guilty of a contempt of Court. But that statute does not apply to the present case; because the charges which are here complained of as being excessive were occasioned by the great trouble the officer had in levying the execution, which necessarily created an increase of fees, and occasioned by circumstances over which the officer had no control, but resulting from the violent conduct of the defendant himself, which rendered it necessary to employ an extra number of men for several nights, in order to keep the goods in safe custody. [*Parke, B.*—Those are expenses which are not allowed in the table of fees made in pursuance of the recent act. There is nothing in the act relating to any such expenses; nor is there any provision allowing any other expenses than those mentioned in the schedule.] It is apprehended that these are such expenses as the Master ought to allow on taxation. [*Parke, B.*—The Master is only to allow what the sheriff is entitled to under the stat. 29 Eliz., c. 4, and the fees mentioned in the schedule of fees allowed by the Judges under the recent statute. What is the sheriff to do for his poundage? He is not to receive it for doing nothing. He is

sufficiently paid by it to enable him to meet the ordinary incidental expenses, and he must take the risk of that.] It will be a hardship on the sheriff if no charges are allowed except those mentioned in the schedule, as he has been put to great expense in obeying the process of the Court.

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Whitehurst, *contra*, was stopped by the Court.

LORD ABINGER, C. B.—The proceeds of the property which was lost, and not sold, cannot be refunded; but if not accounted for, the defendant may bring his action against the sheriff. I think the money allowed for poundage, and the costs allowed by the schedule, sufficient. The officer must refund the money improperly charged, and pay the costs of this application.

The rest of the Court concurred.

Rule absolute to refund 7*l.* 15*s.* 9*d.*, with costs.

KENRICK v. PHILLIPS.

THIS cause was referred to arbitration at the last Ruthin Spring Assizes, and a verdict was entered for the plaintiff by consent for £500, the damages laid in the declaration. The plaintiff, in his particulars of demand, claimed 42*l.* 6*s.*, and interest from the 1st day of July, 1838. The submission to arbitration contained a power for the arbitrator to proceed *ex parte*, in case either party did not attend; and the defendant not having attended any of the meetings, the arbitrator accordingly proceeded

Jan. 14.

A cause was referred at Nisi Prius, and a verdict entered for the plaintiff by consent, for the damages in the declaration, which exceeded the amount claimed in the particulars of demand. The arbitrator awarded that the verdict should stand at

the amount for which it was entered:—*Semble*, that the particulars of demand were not necessarily before the arbitrator, and that if the defendant intended to limit the plaintiff's demand to the amount claimed by the particulars, he ought to have brought the particulars before the arbitrator.

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PHILLIPS.

ex parte, and awarded that the verdict should stand at the amount for which it was entered.

Jervis now moved for a rule to shew cause why the award should not be set aside. The arbitrator has exceeded his authority, in awarding to the plaintiff a greater sum than he claimed by his particulars of demand. There are several authorities to shew, that if the arbitrator awards more than the amount of the verdict, the award is bad altogether: *Bonner v. Charlton* (a), *Pearse v. Cameron* (b). The plaintiff is bound by his particulars of demand, which ought to be annexed to the record by him. If they were not so annexed, he ought not to be allowed to take advantage of that, which was his own wrong. [*Alderson*, B.—Your argument proceeds on the supposition that the *Nisi Prius* record is always before the arbitrator; whereas the practice is for the officer of the Court to keep it, and to enter the verdict finally according to the arbitrator's award.] By rule 6 of T. T. 1 Will. 4, the plaintiff's attorney is required to have the particulars annexed to the record at the time it is entered with the Judge's marshal, and it must be assumed that the arbitrator had the record before him. [Lord *Abinger*, C. B.—Suppose it should turn out that the arbitrator never had the particulars before him? I do not see how we can interfere unless they were before the arbitrator.] It has been held that the defendant may be allowed to use the particulars without putting them in, and that his so using them does not give the reply. [Lord *Abinger*, C. B.—If the defendant wished to limit the plaintiff's demand to the amount of the particulars, he should have brought the particulars before the arbitrator. *Parke*, B.—No doubt the plaintiff is bound by his particulars of demand, and that may be a good ground for a motion to reduce the ver-

(a) 5 East, 139.

(b) 1 Mau. & Selw. 675.

dict to the amount claimed by the particulars; but there has been no exercise of excessive authority, and no fault in the arbitrator.]

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1841.

KENRICK
v.
PHILLIPS.

The Court ultimately granted a rule nisi to set aside the award, unless the plaintiff would consent to reduce the verdict to the amount of the particulars of demand; which was discharged on the merits.

SNEEZUM v. MARSHALL.

THIS was an action for a breach of contract in not making out a good title to a public-house, agreed to be sold by the defendant to the plaintiff. On the trial before Lord Abinger, C. B., at the Middlesex Sittings after last term, it appeared that the premises were part of considerable property held under one lease granted by the late Lord Somers, and that the property so leased had been subdivided and underlet. The covenants in the original lease extended over all the property, and the original lease contained a proviso for re-entry on breach of any of the covenants therein contained. The under-leases were subject to the covenants and provisoes in the original lease. The agreement on which the action was brought was stamped with a £1 stamp, and it stated, that the sale was subject to the covenants set forth "in a draft of a lease delivered this day." If the words of the covenants, so referred to, were not to be reckoned in calculating the amount of stamp duty, the £1 stamp would be sufficient; but if otherwise, a higher stamp would be requisite, as the agreement and covenants together exceeded 1080 words. It was objected by the defendant's counsel, that the covenants referred to must be considered as embodied in the agreement, and therefore that the stamp was insufficient. The Lord Chief Baron, however, received the agreement

Jan. 14.

An agreement for the sale of a house stated that the sale was subject to the covenants set forth "in a draft lease delivered this day:" — *Held*, that in calculating the number of words with reference to the stamp upon the agreement, the covenants in the lease were not to be included; and, the agreement containing less than 1080 words, and being stamped with a £1 stamp, that the stamp was sufficient.

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in evidence, but gave the defendant leave to move to enter a nonsuit, if the Court should be of opinion that it was inadmissible. A verdict having been found for the plaintiff,

Kelly now moved accordingly.—The stamp was insufficient, because the covenants in the lease referred to must be considered as part of the agreement. [*Parke, B.*—The words of the Stamp Act, 55 Geo. 3, c. 184, schedule, part 1, "Agreement," are "together with every schedule, receipt, or other matter put or indorsed thereon or annexed thereto." In *Attwood v. Small* (a), where an agreement referred to a clause in a former agreement, and provided that it should extend to the new agreement as if it had been repeated therein, it was held that the clause referred to could not be considered as "annexed to" the new agreement, so as to make an additional stamp necessary.] That is distinguishable from the present case. It is admitted that the covenants in the draft lease referred to do not come within the meaning of the words—"schedule, receipt, or other matter put or indorsed thereon or annexed thereto;" but they form part of the agreement itself, and it is the same as if all had been written on one sheet of paper. It might have been otherwise if it had said, "the covenants in a certain indenture of lease contained," but this is—"in a draft of a lease delivered this day." The question cannot depend upon the fact of there being one continuous writing, nor can be altered by the use of several sheets of paper referring each to the other. It never could with reason be held, that the application of the additional duty should be prevented by the latter circumstance. The mere fact of the words not being in the instrument itself, cannot exclude them from computation.

Lord ABINGER, C. B.—I still entertain the opinion

(a) 7 B. & C. 390; 1 M. & R. 246.

which I expressed at the trial, that the act applies only to the instrument itself, and to the schedules, receipts, and other matters which are indorsed thereon or annexed thereto; and that matters which are merely referred to, cannot be taken into account in computing the words contained in the agreement. According to Mr. *Kelly's* argument, if an agreement referred to any number of deeds, a reference to which was necessary in order to understand the agreement, it would be necessary to stamp the instrument with reference to the number of words contained in every deed. No principle of construction would warrant us in extending the provisions of the Stamp Act so far as that.

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PARKER, B.—The act is to be construed strictly. In *Attwood v. Small*, Lord *Tenterden's* judgment proceeded on the ground, that “the words of the clause of reference were not in the instrument, nor in any schedule, receipt, or other matter put or indorsed thereon, or annexed thereto.” Applying that principle to the present case, it is clear that no increase of stamp was necessary; and therefore the agreement was properly received in evidence.

ALDERSON, B.—Nothing is to be taken into account in stamping the instrument, except what is written on the paper itself or is annexed thereto.

GURNEY, B.—The words which impose the duty specify certain classes of cases, and, in my opinion, this case is not within them.

Rule refused.

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1841.

MACKAY v. WOOD and Another.

Jan. 16.

To an action by the indorsee against the acceptor of a bill of exchange, a plea that the drawer had been twice bankrupt, and that his estate had not paid 15*s.* in the pound under the second fiat, whereby the property in the bill vested in the assignee under the second fiat, and the drawer could make no title by indorsement, is an issuable plea.

ASSUMPSIT by the indorsee against the acceptors of a bill of exchange. The defendants, who were under terms of pleading issuably, applied to *Gurney, B.*, at chambers, for leave to plead (in addition to a denial of the acceptance and indorsement), that before the making of the bill in question, the drawer had been twice bankrupt, and that his estate had not paid 15*s.* in the pound under the second commission, by reason whereof the property in the accepted bill vested in the assignee under the second commission, and the drawer could make no title by indorsement. The learned Baron had refused to allow the latter plea, on the ground that it was not an issuable plea. *Butt* had obtained a rule to shew cause why the defendants should not be at liberty to plead the above plea, citing *Elston v. Braddick (a)*.

Crompton now shewed cause.—The plea in question is not an issuable plea, because it does not go to the merits. In *Wettenhall v. Graham (b)*, it was held that a defendant who is under terms to plead issuably, cannot plead that the plaintiff has been discharged under the Insolvent Debtors' Act, and that the cause of action has passed to his assignees. This defence is in substance the same. Besides, the plea is idle and frivolous; for the maker of a promissory note cannot set up as a defence, that the payee has become bankrupt, whereby his indorsement was void, and gave the indorsee no right to sue: *Drayton v. Dale (c)*.

Butt, contra, referred to *Willis v. Hallett (d)*, where the

(a) 2 C. & M. 435.

(c) 2 B. & C. 293; 3 D. & R. 534.

(b) 4 Bing. N. C. 714; 6 Scott, 603.

(d) 5 Bing. N. C. 465; 7 Scott, 474.

bankruptcy of a plaintiff after the cause of action had accrued, but before the action was brought, was held to be an issuable plea.

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WOOD.

PARKE, B.—The question is, whether this is an issuable plea or not, because if it is, the defendants are entitled to plead it *ex debito justitiæ*. If it were clear that the plea would be bad on demurrer, I agree that it could not be considered an issuable plea; but I incline at present to think that the plea is good. It amounts in substance to this, that, by the act of acceptance, the defendants created a property in the plaintiff, which immediately vested in a third person. In *Kitchen v. Bartsch (a)*, which was an action by the payee against the maker of a promissory note, it was held a good plea, that the note was made payable to the plaintiff after his bankruptcy, and that the assignees had required the defendant to pay them the money claimed by the plaintiff. That is to be considered an issuable plea, upon which a decision on demurrer, or by a jury, would determine the action on the merits.

ALDERSON, B.—Any plea must be considered an issuable plea, which, being determined in favour of the defendant, shews that the plaintiff has no right of action. The rule to be collected from the decision of this Court in *Humphreys v. The Earl of Waldegrave (b)*, is, that a plea is an issuable plea which tenders some matter, upon which, if issue be taken, the case would be decided upon the merits. The plea, therefore, must be allowed.

GUENEY, B., and ROLFE, B., concurred.

Rule absolute.

(a) 7 East, 53.

(b) 6 M. & W. 622.

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Jan. 16.

The stat. 4 & 5 Anne, c. 16, s. 4, does not extend to the case of the Crown, and therefore the Court has no authority to give a defendant leave to plead several matters, in an information of intrusion filed by the Attorney-General.

ATTORNEY-GENERAL *v.* DONALDSON and Others.

THIS was an information of intrusion, filed by the Attorney-General against the defendants, who were commissioners of sewers, and who had as such commissioners rated the palace of Kensington, and levied the rate by distress in a house alleged to be part of the palace.

Ogle moved, under 4 & 5 Anne, c. 16, s. 4, for leave to plead several matters; first, not guilty; secondly, that the house was not part of the Royal Palace; thirdly, that the trespass was committed by the defendants under the authority of the statutes relating to sewers. In the *Attorney-General v. Snow (a)*, the defendant, who was surety for a clerk of the cashier of excise, on being sued by information of debt upon his bond, was allowed to plead double, viz. non est factum, and performance of the conditions. So, in the case of *Rex v. Huggins (b)*, which was an action for an escape for the debt of the King against the Warden of the Fleet, the defendant was allowed to plead double. It was there said by the counsel on moving, and agreed by the Court, that this statute "extends to the King's suit as well as to that of the subject."

PARKE, B.—The case of *The Attorney-General v. Allgood (c)* is an authority directly in point against this application. There *Parker, C. J.*, states, that since the delivery of the opinion of the Court in that case, (that double pleading ought not to be allowed in the case of informations of intrusion), the case of *Rex v. Huggins* had been printed in Comyns's Reports, but was misreported; and he goes on to observe, that in *The Attorney-General v. Snow*, (which also had been since printed in Bunbury), the reporter had added a quære, whether the statute extends to the Crown.

(a) Bunb. 96.

(b) Com. Rep. 422.

(c) Parker, 15.

He then states, that, notwithstanding that case, he sees no reason to depart from the opinion of the Court in *Rex v. Allgood*, especially as it was confirmed in the case of *Rex v. Sir C.W. Phillips (a)*, and the practice had been accordingly ever since. We therefore think that the cases in *Bunbury* and *Comyns* must be taken to have been overruled, and that the authority of the Court under the statute 4 & 5 Anne, c. 16, to allow double pleading, does not extend to this case.

The rest of the Court concurred.

Rule refused.

(a) Hil. Term, 20 Geo. 2.

JONES v. LITTLER.

SLANDER.—The declaration stated, that the plaintiff was a brewer, and that the defendant falsely and maliciously spoke and published of and concerning him in the way of his trade as a brewer, the false, scandalous, malicious, and defamatory words following:—"I'll (meaning that he, the defendant would) bet £5 to £1, that Mr. Jones (meaning the plaintiff) was in a sponging-house for debt within the last fortnight, and I can produce the man who locked him up; the man told me so himself:" whereupon the said Henry Pye then asked the defendant, "Do you mean to say, that Mr. Jones, brewer, of Rose Hill, (meaning and describing the plaintiff), has been in a sponging-house within this last fortnight for debt?" and thereupon the defendant then replied to the said Henry Pye, and the said other persons then present, "Yes, I do."

The cause was tried before *Rolfe, B.*, at the last Li-

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Slander for speaking of the plaintiff the following words: "I will bet £5 to £1 that Mr. J. (the plaintiff) was in a sponging-house for debt within the last fortnight, and I can produce the man who locked him up; the man told me so himself." And in answer to the following question from a bystander, "Do you mean to say, that Mr. J., brewer, of Rosehill, has been to a sponging-house within this last fortnight for debt?"

the defendant said, "Yes, I do." The jury found that the words were spoken of the plaintiff in the way of his trade:—*Held*, that the action was maintainable, and that the verdict was right, as it was plain from the conversation that the words were spoken of the plaintiff in his character of a brewer.

Semble, also, that the words were actionable independently of that, because they must necessarily affect the plaintiff in his trade and credit.

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LITTLE.

verpool Assizes, when, no special damage having been proved, it was objected, on the authority of *Ayre v. Craven* (a), that the words could not be considered as spoken of the plaintiff in the way of his trade, and therefore that he ought to be nonsuited. The learned Judge refused to nonsuit, and the jury returned a verdict for the plaintiff.

Kelly, in Michaelmas Term last, applied for a rule to shew cause why a nonsuit should not be entered, or why the judgment should not be arrested. The Court refused a rule on either of those grounds, but granted a rule to shew cause why there should not be a new trial, on a suggestion that the learned Judge ought to have left it as a question to the jury whether the words were spoken of the plaintiff in the way of his trade, and did not.

Cresswell and *Wightman* now shewed cause.—The jury have found that the words were spoken of the plaintiff in the way of his trade, and in so doing they have come to a right conclusion. The words alleged to have been spoken amount to an allegation that the plaintiff was insolvent, and if so, it must apply to him in the way of his trade as a brewer. The case of *Ayre v. Craven* was a different case altogether. If the words there laid had been alleged to have been, that in the plaintiff's character of physician he had been incontinent, they would have been actionable in themselves, as necessarily affecting him in his professional character. That case was decided on the authority of *Lumby v. Allday* (b), where it was held that the words charged as slanderous must shew the want of some general requisite, as honesty, capacity, fidelity, &c., or connect the imputation with the plaintiff's office, trade, or business. [*Parke*, B.—The case of *Stanton v. Smith* (c) is directly in point.

(a) 2 Ad. & Ell. 2; 4 N. & M. 220.

(b) 1 Cr. & J. 305.

(c) 2 Lord Raym. 1480.

It was there held, that it was actionable to say of a tradesman, "He is a sorry pitiful fellow, and a rogue; he compounded his debts at 5s. in the pound;" though there was no colloquium of his trade: but if the question was put to the jury, and they found it to have been spoken of the plaintiff in his trade, there is an end of the matter.] Insolvency is necessarily connected with trade. If a man cannot pay his debts, he cannot pay his mercantile debts. The damage is the same, whether the defendant happens to be speaking of him in his trade of a brewer, or not. [*Alderson, B.—Doyley v. Roberts (a)* seems to be an authority to the contrary. There the following words were spoken of an attorney—"He has defrauded his creditors, and has been horsewhipped off the course at Doncaster;" and it was held that they were not actionable, unless they were spoken of him in his profession.] The words, to be actionable, must either necessarily affect the plaintiff in his trade, must be spoken of him in his trade, or must be shewn to have affected him injuriously. In *Doyley v. Roberts*, and *Ayre v. Craven*, the words did not necessarily affect the party in his trade. In Com. Dig., Action upon the case for Defamation, (D. 22), the following is put as an instance of words which are actionable:—"If he say of a counsellor, 'Thou art no lawyer; canst not make a lease; they are fools that come to thee for law.'"

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Alexander, in support of the rule.—There was no evidence to shew that the words were spoken of the plaintiff in the way of his trade, and that question was not properly left to the jury. [*Rolfe, B.*—I am sure I put the question to the jury, whether the words were spoken of the plaintiff in his trade, and they found that they were.] The rule was granted on that ground.

PARKER, B.—It is quite clear that this rule ought to be

(a) 3 Bing. N. C. 835; 5 Scott, 40.

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discharged for the only ground on which it was granted has failed, inasmuch as the learned Judge did leave the question to the jury, whether the words were spoken of the plaintiff in his trade; and, indeed, it is plain that the words were so used, from the fact, that in the conversation in question, the plaintiff was spoken of as a brewer. Independently of that, however, and even if they were spoken of him in his private character, I think the case of *Stanton v. Smith* is an authority to shew that the words would have been actionable, because they must necessarily affect him in his trade. It is there said, "We were all of opinion that such words spoken of a tradesman must greatly lessen the credit of a tradesman, and be very prejudicial to him, and therefore that they were actionable." That case is distinguishable from *Ayre v. Craven* and *Doyley v. Roberts*. In the latter of those cases, the words were not spoken of the plaintiff in his business of an attorney; and in the former it did not appear in what manner the immorality was connected with the plaintiff's profession of a physician: and it was possible that such imputations of incorrect conduct, out of the line of their respective professions, might not injure their professional characters. But this case is distinguishable, because here the imputation is that of insolvency, which must be injurious; for if a tradesman be incapable of paying all his debts, whether in or out of trade, his credit as a tradesman, which depends on his general solvency, must be injured. The case of *Stanton v. Smith*, as it appears to me, is good law, notwithstanding the observations of *Coltman, J.*, in *Doyley v. Roberts*.

ALDERSON, B., and ROLFE, B., concurred.

Rule discharged.

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Todd and Another v. EMLY and Another.

Jan. 19.

ASSUMPSIT for goods sold and delivered. Plea, non assumpsit.

The cause was tried before Lord *Abinger*, C. B., at the last Summer Assizes at Guildford, when it appeared that the action was brought to recover from the defendants, who had been members of the committee of the late Alliance Club, the amount of a bill for wine supplied for the use of the club, under the following circumstances:—The members of the Alliance Club, which was formed in the year 1836, were the proprietors of the club and the renters of the house. They paid entrance-money and an annual subscription, cash being paid for all provisions consumed in the club-house. The funds were deposited at a banker's appointed by the members of the club, and were drawn out by cheques signed by three of the committee, and countersigned by the secretary. The rules of the club were not in evidence at the trial. The wine in question had been supplied by the plaintiffs to the order of the steward of the club, given in the presence of a committeeman, and the steward had on several occasions given similar orders, but always, as he stated, first applying to some member of the committee. It did not appear that either of the defendants had signed any cheques, or had individually authorized any orders for wine.

There was some evidence of the defendants having attended meetings held by the members of the club after it had ceased to exist, at which the affairs of the club were discussed with a view to an arrangement with the creditors, and evidence was offered of a conversation, in which it was said that the defendants had admitted their liability; but the Lord Chief Baron ex-

A club was formed, by the regulations of which the members paid entrance-money and an annual subscription, and cash was paid for provisions supplied to the house. The funds of the club were deposited at a banker's, and a committee was appointed to manage the affairs of the club, and to administer the funds, but no member of the committee had authority to draw cheques, except three who were chosen for that purpose, and whose signatures were countersigned by the secretary:—*Held*, in an action brought against two of the committee by a tradesman who had supplied wine on credit, ordered by a member of the committee for the use of the club, that the tradesman was not entitled to recover, without proving either that the defendants were

privy to the contract, or that the dealing on credit was in furtherance of the common object and purposes of the club.

Esch. of Pleas, 1841. pressed an opinion, that it was merely an attempt as men of honour to save the creditors harmless, and did not make the defendants liable; and the case was not left to the jury, the counsel for the defendant submitting to a verdict for the plaintiffs, upon leave being reserved to him to move to enter a nonsuit. *Thesiger* having, in Michaelmas Term, obtained a rule accordingly,

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Cresswell and *Platt* now shewed cause.—The question in this case is, whether there was evidence to be left to the jury, that these defendants authorized the contract declared on to be made with the plaintiffs on their behalf. In the case of a partnership, each member of the firm gives to the others an authority to contract in his name; but it is not necessary to contend for the existence of a partnership in this case, for there may be a similar authority given without any partnership; and if persons for their mutual convenience, or other object, give to a party authority to contract in their name, they are responsible. Now there was abundant evidence to go to the jury in this case, that Chapman, who was the steward of the club, and who ordered the wine in question, was authorized by the defendants to make the purchase on their credit,—it matters not here whether as individuals only, or in common with the rest of the committee or the whole club. If so, the verdict was right, and ought not to be disturbed. The Alliance Club was not, as in the case of *White's* or *Crockford's*, under the management of the steward or proprietors of the house; but the members were themselves the proprietors of the establishment, as in the case of the United Service Club, and the committee was a body delegated by them to conduct the affairs of the club, over which they were to exercise an absolute control. The committee, therefore, would exercise a control over the orders for goods, as well as over the payments. The orders for wine were invariably directed by the commit-

tee, and whatever portion of them might be there to act, it was the act of the committee. [*Parke, B.*—It is only the act of those committeemen who were present.] There was a general authority given to the steward to order wine from the plaintiffs, and in that view, as members of the club, the defendants are liable. Supplies of this kind are absolutely necessary to the existence of a club, and are notorious to all the members. Then, upon whose credit were they furnished? It cannot be said on the credit of Chapman, for he was a mere servant. It is clear that the credit was given to the members of the club, for whose use the goods were supplied, and it follows that all of them are liable. There is abundant evidence of knowledge on the part of the members, that such orders were given from time to time, and they are responsible for those orders. When persons combine together, and undertake to carry out one common object, every person who interferes becomes responsible; that the orders are given by different parties makes no difference, all are equally liable. The case of *Horsley v. Bell* (a) is a distinct authority for the plaintiffs. There, an act of Parliament having been passed to make a certain brook navigable, the defendants and others were named commissioners to carry the act into execution, by which tolls were to be taken, and the commissioners were empowered to borrow money thereon. A treasurer and surveyor were appointed, and the work was commenced. The defendants were all acting commissioners, by whom the plaintiff was employed to do certain work in prosecution of the scheme, and to whom they gave orders from time to time. These orders were given at different meetings by such of the defendants as were present, but none of them were present at all the meetings at which the orders were given; so that the defendants did not join in all the orders, but every one of them joined in making

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(a) Ambler, 770; 1 Bro. C. C. 101.

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some one of the orders: and they were all held liable. The acting commissioners in that case are analogous to the committeemen in the present, who take upon themselves the management of the club, as the commissioners did the carrying out of the objects of the act of Parliament. [*Parke, B.*—The orders there were to make one entire thing.] Yes; but that was to be done by performing different acts. Here there was equally one entire thing, viz. the carrying on the business of the club. Every individual act that is done is part of the general management. [*Lord Abinger, C. B.*—In the case of *Fleming v. Hector (a)*, in this Court, the rules of the club were produced in evidence, and one was that cash should be paid, and no credit given. *Alderson, B.*—The question is, whether there was evidence for the jury that the committee undertook generally to manage the affairs of the club on their credit.] There was abundant evidence of that; and if so, they were liable. [*Parke, B.*—There is no doubt in this case, that the steward who gives the order is *prima facie* liable, unless he can make out that he received an order from some one else, and then he is not personally liable. Then who gave the orders to the steward? Not the defendants; then you must go further, and satisfy the jury that the order was given by some person having power to bind them; the question then is, have you given reasonable evidence of that?] The steward gave the order on behalf of the club, or committee, from whom he had a general authority, and was not therefore personally liable. There is nothing to shew that the committee repudiated what had been done by Chapman, on the authority under which the contract was made. Then with respect to what took place after the dissolution of the club, at the meeting of the members, that was evidence for the jury, and had the case gone to them, must have been left as a question for them

(a) 2 M. & W. 172.

to decide. [Lord *Abinger*, C. B.—Nothing went to the jury. What took place at that meeting I considered only an attempt, as men of honour, to save the creditors harmless.]

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Thesiger, in support of the rule.—This was treated at the trial entirely as a question of law, and there is no ground for saying that any legal liability attached to the defendants. The extent of the authority of the committee did not fully appear, but it appeared that they had control over the funds of the club for certain purposes. Those funds could only be obtained by means of the signature of three of the committee; but the cheques so signed were to be countersigned by the secretary. The committee were therefore trustees of the fund, and that was the whole extent of the evidence as to their power. Assuming that the whole body of the committee are the agents of the club, still it is clear that no single member of the committee can act as such agent. In the case of *Fleming v. Hector*, it was held that the committee at large were not agents for the club, to bind the members in respect of contracts entered into by them, for that the committee had no right to pledge the personal credit of the members. But then it is said that the members of the committee have power to bind one another. But the steward, although he had a general authority, never acted on that, but invariably applied to some member of the committee, and with respect to the wine in question, one of the committee was present when the order for it was given. It is true that the defendants were aware of the fact that the plaintiffs supplied the wines to the club; but that, in *Fleming v. Hector*, was not considered as a circumstance which affected the liability of the members. These defendants had no further knowledge of this matter than other members of the club. In *Horsley v. Bell*, all the acting commissioners were attending from time to time, and taking part in, and giving orders for, the prosecution

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of the works, whereas in the present case there was no evidence to shew that the defendants ever gave a single order. In *Thomas v. Edwards (a)*, which was an action by an innkeeper against one of the committee of a candidate at a contested election, for refreshments supplied to voters, which were in fact ordered through a third party, it was held that the plaintiff must prove that the party ordering them was employed by the defendant alone, or by the defendant and others, to do so, and that the defendant was not acting merely as agent for some other person. The credit is not given, in cases of this sort, to the members of the club, or to any particular individuals in it, but to the establishment generally, to the respectability of which the tradesman trusts for payment.

Lord ABINGER, C. B.—It strikes me, after considering this question very much, that those gentlemen who are members of the committee are not in the nature of agents, to bind the club by their contracts; but that they are trustees, having the management and the administration of the funds of the club. It does not appear upon the evidence, that they were authorized by any members of the club to deal on credit, but only to expend the funds which they had in their possession as trustees. To be sure they cannot authorize the paying away of those funds, except by the agreement of the other members of the club. It must be assumed here, that the members of the club generally did agree that three particular trustees should dispose of the funds by drawing cheques; but one trustee cannot bind another by his act, nor can one of these gentlemen constitute himself agent of another. If it were provided by the rules and orders of the club, that the committee, conducting the affairs of the club, should have authority to make contracts for the club, then they might make contracts for each other; but in the absence of any evi-

(a) 2 M. & W. 215.

dence of that kind, what is it more than the case of a set of gentlemen being named as trustees to manage a fund? The fund is placed in the banker's hands, and there it is to remain to answer the demands of the club; but it does not appear that the committee authorized each other to pledge each other's credit, or that the club, as a body, authorized the committee to pledge their credit; nor were they bound or authorized to contract upon credit. That is the principle laid down in *Fleming v. Hector*; and it appears to me to be applicable to this case, unless it can be shewn, that by the rules and orders of the club the committee were authorized to contract upon credit, or that in any other way the whole club agreed that the committee should make such contracts. Suppose a man appoints by deed trustees to manage a particular fund, is one of those persons liable for the acts of the other? It seems to me that he is not; one cannot make himself the agent for another; each is liable for his own acts only. To make each other liable, they must meet together, and concur in any act that may be done by them as trustees. Here the evidence does not fix the two defendants as having authority to pay for the wine or to give orders.

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PARKER, B.—It is difficult to say that there was not some evidence to go to the jury; because the defendants' acts, in attending meetings, and offering sums of money by way of compromise to the creditors, are undoubtedly evidence to go to the jury. I do not say that it is evidence to which one ought to attach much weight: but if I were asked the question, whether there was or not some evidence to go to the jury, I should certainly hesitate before I said there was not. It is the jury who are to put a construction on those acts. I think, however, that the construction put by my Lord upon one of those acts is that which the jury ought to put upon it, namely, an attempt as men of honour to get up a subscription among themselves, in order to let

money transactions. My impression therefore is, that although there might be some evidence on the latter part of the case to go to the jury, though very slight, yet that on the former part of the case the plaintiffs have failed, that is, they have not shewn, with sufficient clearness, any privity on the part of the defendants to the contract, or any knowledge that any committeeman was authorized to deal upon credit for the others.

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ALDERSON, B.—I entirely concur in the view of the case taken by my Brother *Parke*, and think that as the members of a club generally, (as was held in the case of *Fleming v. Hector*,) are to be considered as not having authorized anybody to deal for them upon credit, so here the committee were authorized only to deal, as a body, for ready money. But at the same time, if any of the members of the committee choose to contract not for ready money, those members of the committee who have so contracted are liable upon their own contract, and the members who have not concurred in it are not liable, unless that be the common purpose for which the committee was appointed. I think the plaintiffs have failed as to the common purpose. Granting Mr. *Cresswell's* argument to be as he puts it, still they fail; for they do not shew that this contract was within the common purpose. I think, therefore, that there should be a new trial, as there may be evidence to alter the case in that respect.

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the tradesmen go harmless ; but I think it cannot be considered as an admission of liability. If it is contended, that that attempt at a settlement was an admission that the committee were authorized to enter into the contracts, it is a question for the jury. Then we come to the other, which is the main point of the case, and upon which it may be urged, that where parties enter into one common purpose of acting together, each of them has authority to bind the others to the extent of attaining that common purpose. But the defect in the plaintiffs' case is, that there is no common purpose shewn, of dealing on credit for such articles as were supplied in this case. The evidence shews that a fund was subscribed, which fund was to be administered by a committee. The committee can only be supposed to have agreed to do that which the subscribers to the club had power themselves to do, that is, to administer that fund so far as it went. They were not expected to deal on credit, except for such articles as it might be immediately necessary for them to have dealt for on credit. The making purchases of what was necessary would be only what they ought to do according to the trust reposed in them, and these must be taken to be purchases for ready money, unless distinct evidence was given that they were authorized to enter into contracts on the part of the general body for the common purpose, and to deal on credit, so as to make one the agent for another. It might be different, perhaps, in the case of hiring the servants of the establishment, where there must necessarily be credit for a certain period, because you cannot pay wages down ; but as to butcher's meat, wine, furniture, and almost anything else, those may be ready money transactions. Unless there is some evidence to the contrary, each member of the committee must be considered as exercising only a concurrent authority with the others in the due administration of the fund, and obtaining credit for such matters only as cannot be the subject of ready

money transactions. My impression therefore is, that although there might be some evidence on the latter part of the case to go to the jury, though very slight, yet that on the former part of the case the plaintiffs have failed, that is, they have not shewn, with sufficient clearness, any privity on the part of the defendants to the contract, or any knowledge that any committeeman was authorized to deal upon credit for the others.

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Rule absolute.

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Jan. 19.

A bill of exchange having been drawn upon A. B., was accepted by him, and was afterwards indorsed by the drawer to the plaintiffs, who indorsed it to the Birmingham and Midland Counties' Bank, who indorsed it to one W. The bill having been dishonoured when due, W. gave notice of it to the bank, who gave notice to the plaintiffs, one of whom wrote the following letter to the drawer:—"Dear Sir,—To my surprise, I have received an intimation from the Birmingham and Midland Counties' Bank, that your draft on A. B. is dishonoured, and I have requested them to proceed on the same:"—*Held*, that if there was more than one bill to which the letter could apply, it lay upon the defendant to prove that fact, in order to shew its uncertainty.

Held also, that the letter was a good notice of dishonour.

SHELTON and Others v. BRAITHWAITE.

ASSUMPSIT by the indorsee against the drawer of a bill of exchange. Plea, that the defendant had not received due notice of dishonour. At the trial before *Rolfe*, B., at the Middlesex Sittings in this term, it appeared that the bill was drawn by the defendant upon and accepted by one A. B., and that it had been indorsed by the defendant to the plaintiffs, who indorsed it over to the Birmingham and Midland Counties' Bank, who indorsed it to one Williams. The bill became due on the 17th of August, when it was presented for payment and dishonoured. Williams then gave notice to the bank, who gave notice to the plaintiffs, who wrote to the defendant as follows:—"Dear Sir—To my surprise I have received an intimation from the Birmingham and Midland Counties' Bank, that your draft on A. B. is dishonoured, and I have requested them to proceed on the same." There was no proof of the existence of any other bill to which the letter could apply, and the plaintiffs had a verdict, leave being reserved to move to enter a nonsuit.

Gurney now moved accordingly.—A notice of dishonour must contain, either expressly or by necessary inference, all the knowledge relative to the bill which the defendant is entitled to have. This notice is not a sufficient description of the bill. It says only, "your draft on A. B.," which was insufficient. No date is given, nor does it even appear that the bill had been accepted. It is not even called a bill of exchange, and the words used would rather refer to a cheque. There is no case where such a notice has been held sufficient. [*Alderson*, B.—Still the Court must take into consideration the circumstances of the case, and the knowledge which the defendant has of those circumstances; and no other bill is shewn to exist.] If there

was but one bill, it was for the plaintiffs to have established that fact, and it is not to be presumed in their favour. Until the plaintiffs shew that there was but one bill, the notice is insufficient, without giving the date, or shewing that it had been accepted, and by whom, so as to identify it. Besides, it does not sufficiently appear from this letter that the plaintiffs intended to look to the defendant for payment. It has been held that the party must shew by his notice that he looks to the defendant as liable to him on the bill. The notice is a substitute for the protest which was formerly made, and which contained an exact description of the bill.

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LORD ABINGER, C. B.—I think the notice was sufficient. If there were other bills or drafts to which the notice could apply, it was for the defendant to shew that. As he has not done so, the maxim “*de non apparentibus et de non existentibus eadem est ratio*” must apply. If it does not appear that there were other bills or drafts, we cannot presume that there were any such.

PARKE, B.—It seems to me that the notice was quite sufficient. If there was another bill answering the same description, the defendant might have proved that fact, and then the notice would have been uncertain; but as there is no such proof, I think the notice is a sufficient description of the bill on which the action is brought. Then as to the other point: the word “dishonour” is a technical word, which intimates that the bill has been presented and refused payment; and then the concluding part of the notice clearly shews that the plaintiffs meant to hold the defendant, and all other collateral parties, liable for the default of the acceptor. The Birmingham and Midland Counties’ Bank must be assumed to be the plaintiffs’ agents for the purpose of obtaining payment of the bill. That being so, all the essentials that are required to charge the

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drawer occur in this case, which comes within the principles laid down in *Solarte v. Palmer* (a), and other cases on this subject.

ALDERSON, B.—I am of the same opinion. It seems to me that the notice is sufficient, taking into consideration what must, in the opinion of the Court, be the facts on which their judgment is to be founded; that is to say, the knowledge of the party to whom the notice is given, of the circumstances under which it was given. If he who has peculiarly the means of knowing whether there are more bills than one, does not shew to the Court that there are more, the reasonable inference is that there is but one. Then, if the party by whom a bill of exchange has been drawn on A. B. (there being but one bill of exchange drawn by him on A. B.) receives a notice that his draft on A. B. has been dishonoured, that, as it seems to me, clearly refers to the bill of exchange which he has drawn on A. B. The defendant has therefore notice that the particular bill on which the action is brought has been dishonoured. Now the term “dishonoured” is a technical word which, as my brother *Parke* has said, imports that the bill has been presented for payment, and has not been paid by the acceptor. So far, then, it appears that the bill of exchange has been presented to the acceptor, and has not been paid when due. Then the remaining question is, does the party who gives the notice intimate with sufficient clearness his intention to hold the defendant liable? He informs him that he has requested the Birmingham and Midland Bank (who are the persons whom he in the same notice states to have presented the bill ineffectually) to proceed on the same; which means, to proceed on the same against all those who are liable, and if against all, of course the defendant is included. That fulfils all the requisites of a notice of dishonour. The

(a) 1 Bing. N. C. 194; 1 Scott, 1.

notice must be construed with reference to the defendant's means of knowledge, and I think there is enough here to shew that he must have felt in his own mind that this was a perfect notice of dishonour of the bill in question.

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GURNEY, B., concurred.

Rule refused.

DOE *d.* LOWNDES *v.* ROE.

HAYES moved for judgment against the casual ejector. The affidavit on which he moved stated, that the service was effected by passing the copy of the declaration and notice under the door of the dwelling-house, the tenant being at the time in the house, but refusing to open the door, or listen to the explanation which was attempted to be given of the object and notice of the service.

Jan. 21.

Service of a declaration was effected by passing the copy of the declaration and notice under the door of the dwelling-house, the party being in the house at the time, and refusing to open the door, or listen to the explanation given of the object and nature of the service :
—*Held* sufficient.

PER CURIAM.—If you had reason to believe that the party was in the house and aware of what you were doing, it was sufficient service.

Rule granted.

DERIEMER *v.* FENNA.

A DECLARATION in debt stated, "that the defendant was indebted to the plaintiff in the sum of &c., for goods sold and delivered to the defendant by the plaintiff at *his* request." To this there was a special demurrer, on the ground that the count was ambiguous. *Miller* had ob-

Jan. 21.

A declaration in debt stated, that the defendant was indebted to the plaintiff "for goods sold and delivered to the defendant by the plaintiff at

his request." The defendant having demurred specially to this declaration, on the ground of its being ambiguous, the Court set the demurrer aside as frivolous.

Exch. of Pleas, tained a rule to shew cause why the demurrer should not
1841. be set aside as frivolous.

DERIEMER

FENNA.

Cole now shewed cause.—The declaration is not in accordance with the form given in the schedule to the rule of Trinity Term 1 Will. 4. Its meaning is at least doubtful, and it is laid down as a rule in *Stephen on Pleading* (a), that “Pleadings must not be ambiguous or doubtful in meaning; and when two different meanings present themselves, that construction shall be adopted which is most unfavourable to the party pleading.” According to the grammatical construction, the pronoun “his” refers to the last antecedent, and if it is so taken here, the declaration will be for goods sold and delivered to the defendant at the plaintiff’s request.

LORD ABINGER, C. B.—If you judge by the context, it clearly is meant to be, at the defendant’s request. In the English language, the meaning of particular words or phrases very frequently depends upon the context. In *Spyer v. Thelwell* (b), *Parke, B.* says, “With regard to the objection to the first count, although certainly, *primâ facie*, the word “his” would refer to the last antecedent, viz. the defendant; yet if we call in aid a little common sense, we see plainly that it does not and cannot refer to him, but to the drawer.” That is an authority expressly in point.

PARKE, B.—It has been held to be sufficient if a declaration is certain to a common intent in general; and this is so. The rule, therefore, must be absolute.

GURNEY, B., and ROLFE, B., concurred.

Rule absolute.

(a) 4th Ed. 421.

(b) 2 C., M., & R. 692.

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TAPSELL *v.* CROSSKEY.

SAME *v.* VERNHAM.

Jan. 21.

TRESPASS for breaking and entering the plaintiff's close. Plea, not guilty (by statute). At the trial before Lord *Abinger*, C. B., at the last Summer Assizes at Lewes, it appeared that these actions were brought for the purpose of trying the right of the surveyor of the commissioners of the Hickstead Turnpike Road to dig and carry away flints &c., from a place called the Holt Hill, which formed part of the Newtimber Holt Sheep Down, in the county of Sussex. The locus in quo was bounded partly by a hedge and ditch, partly by banks or ridges, and partly by *doles*, (a provincial term, signifying a conical lump of earth about two feet high, raised to denote the boundaries of parishes, &c. on downs), and a portion of it (where the ground was steep) was without any visible boundary. The Holt Sheep Down was not subject to any rights of common. The flints were dug and carried away for the repair of the Hickstead road, by the direction of the surveyor; but no notice was given to the plaintiff of the surveyor's intention to take materials from the Holt Hill, nor had any order of justices been obtained authorizing him to do so. It was admitted that the plaintiff was the sole owner and occupier of the locus in quo; and the only question in dispute was, whether, under the provisions of the Turnpike Act, 3 Geo. 4, c. 126, the surveyor had a right to take the materials without the order of justices required by the 98th section. His lordship directed a verdict for the plaintiff, subject to a motion to enter a nonsuit, it being agreed between the parties that the actual damage sustained should be settled by the justices under the act of Parliament.

Platt, in Michaelmas Term, obtained a rule accordingly.

The words "inclosed lands," in the 97th and 98th sections of the Turnpike Act, 3 Geo. 4, c. 126, mean lands which are actually inclosed and surrounded with fences; and therefore where lands situate on the Downs were not fenced off, although private property:—*Held*, that a surveyor appointed by the commissioners might take materials for the repairs of a turnpike road, without the order of justices mentioned in the 98th section, such lands not being within the meaning of the words "inclosed lands" contained in that section. But it is otherwise where the land is surrounded by a fence, though it be out of repair.

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Thesiger, Attree, and Peacock now shewed cause.—It is not disputed that the locus in quo is the private property of the plaintiff; but the question for the Court is, whether such lands are “inclosed lands,” within the meaning of the 97th and 98th sections of the General Turnpike Act, 3 Geo. 4, c. 126. It is submitted that they are; and if so, the acts complained of could only be justified as being done under an order of justices, as required by the 98th section; and as no such order was obtained, the plaintiff is entitled to maintain the action. By sect. 97, surveyors are empowered to take materials “out of any common river or brook,” or from “any waste or common,” and may convey such materials over “any waste or common land,” without being liable to any compensation for any injury thereby done to such land; but if they convey such materials over “any inclosed lands or grounds,” they are to make compensation for any damage done to those lands. Again, in the same section, after giving a general power to take materials from “the land of any person or persons,” the surveyors are empowered to land or carry such materials on or over “any inclosed lands or grounds,” (with certain exceptions), “or on or over any open land or common.” The words “inclosed lands” are therefore used in direct opposition to “open or common lands,” and can only mean private lands. In the case of inclosed land, the damage done is to be paid for, which shews that the intention was to protect private interests; but in the case of open land no compensation is provided by the act. The marginal note to the 98th section is in accordance with this view of the case; for there the word “private” is used in reference to “inclosed lands”. The 97th section has reference to three distinct classes of property; viz. lands from which the surveyor is empowered to take materials absolutely; lands in respect of which compensation is to be made; and lands which are protected under any circumstances. The first are open or common

lands, and those terms are here used synonymously, as denoting public lands. The land in question is clearly not within that class. The second description is "inclosed land," which it is submitted comprehends land upon the Downs, like the locus in quo; because, not being waste or common, if it is held not to be inclosed land, there is no power to carry over it at all, where the materials are procured from common land. [Lord Abinger, C. B.—Therefore you infer that the term "common" is used in contradistinction to "inclosed"?] Yes; because the power given in the middle of the 97th section to carry over the "land of any person or persons," is confined to materials got from such land, viz. the land of some person, or private land. The words are, "that it shall be lawful for the surveyor &c. to search for, dig, get, gather, take, and carry away any such materials in or out of the land of any person or persons where the same may be had or found &c., making or tendering such satisfaction for *such* materials, (viz. materials got out of the land of any person or persons), and for the damage done to the owners or occupiers of the lands where and from whence the same shall be dug, gathered, and carried away, or over which the *same* shall be carried, as the said trustees or commissioners shall think reasonable." The word "same" there refers to materials obtained from lands not falling within the description of waste or common lands. Suppose the case of a brook bounded by private land not (in the popular sense of the word) inclosed, the surveyor would have no right whatever of transit or deposit for materials got from the brook, unless such land is included in the terms inclosed lands. If it could be considered as open land, in that case there would be no compensation for injury to private rights.

But further, the locus in quo is inclosed, in the popular sense of the word. [Parke, B.—A fence sufficient to turn cattle or keep them from straying, is an inclosure.] Land

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may be inclosed without any actual fence; a ditch, for instance, has been held a sufficient division to constitute an inclosure: *Ellis v. Arnison* (a). By the 13 Edw. 1, c. 46, a dyke or ditch is pointed out as being a means of inclosing land. [Lord Abinger, C. B.—A ditch may or may not be a proper fence.] The meaning of the word “inclose,” as given in Todd’s Johnson’s Dictionary, is “to part from things or grounds common by a fence.” The land in question was partly fenced by a hedge and ditch, which shewed that the intention was to inclose the land.

Platt and Tyndale, in support of the rule.—This statute was passed with a view to the public benefit, and therefore it must be liberally construed. The second branch of the 97th section includes all private lands, whether inclosed or uninclosed. Therefore, in order to give a certain protection to inclosed lands, the 98th section provided that the sanction of the justices should be first obtained with respect to them. In the 13th Geo. 3, s. 78, the words “several” and “inclosed” are used; but in the present statute, the word “several” is dropped, which shews that the intention of the legislature was to give to the trustees of the roads more extensive powers. The word “open” does not mean waste or common: it cannot be considered synonymous with them; for common lands may, and frequently are, inclosed, to keep the cattle from straying. [They were then stopped by the Court.]

Lord ABINGER, C. B.—It is with great reluctance that I come to the opinion I have formed, because I foresee the consequences of our decision; but I hope it may induce the legislature to make some alteration in the law, and to bring it back to what it was under the old highway act, viz., that if the surveyor took material from any private lands, it should be under the authority of the magistrates: we must, however, construe the act as we find it. I was much

(a) 1 B. & C. 70; 2 D. & R. 161.

struck with Mr. *Peacock's* argument as to that part of the clause to which he referred; and I certainly find this difficulty, that unless we consider the general words in the middle of the section to give a right to take materials from every description of lands, the question would turn upon the first part of the section, and there would be considerable doubt whether the surveyors would not be trespassers, for carrying the stones over the locus in quo, that is, over lands not therein mentioned. However, the act cannot be made consistent in all its parts. It has been justly remarked that the former act of Parliament, the 13 Geo. 3, c. 78, used the words "*several*" and "*inclosed*;" whereas this statute, although it uses words of the same nature, and indeed nearly the same words, yet omits the word "*several*." If it allowed surveyors to take materials from the beds of rivers, and any common or waste lands, and to carry them away, directing compensation to be made for going over *several* lands, then there could be no question that they might take from any lands except inclosed lands. But, looking to the 97th and 98th sections together, the only words which qualify the authority to go into any lands, not being common or waste lands, are those in the 98th section, which requires the sanction of two justices before materials are taken from *inclosed* lands. That this word is not used as synonymous with *private* lands, is clear from other clauses of the act. The 83rd section empowers the commissioners, for the purpose of improving the roads, to divert them over any commons or waste grounds, or uncultivated lands, without making any satisfaction, and also through *private* lands, making satisfaction for the damage: while the 96th section provides that they shall not deviate more than 100 yards over *inclosed* lands, without the consent in writing of the owner. That is a clear distinction made by the act itself between private and inclosed lands. The rule to enter a nonsuit must therefore be absolute.

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PARKE, B.—I am of the same opinion. The question turns on the meaning of the 97th and 98th sections of the 8 Geo. 4, c. 126. It appears in this case, that the defendant entered the plaintiff's land, and took materials from it and carried them over the same, without having obtained the previous sanction of the magistrates; and that brings us to the question, what is the meaning of "inclosed lands" in the 97th section; and it seems to me that their meaning is, lands inclosed in a fence, so as to be completely enjoyed in severalty. In the former statute, 13 Geo. 3, c. 78, s. 29, the words "several and inclosed" are used in conjunction; but in these two sections the word *several* is dropped. It is clear, comparing the two statutes together, that more extensive powers are given by the 8 Geo. 4, than were given by the previous act. Taking refuse stones, and entering common lands, were the only powers given in the first instance to surveyors, except some which it is unnecessary to call attention to. Under the 97th section of this act, where there is a power given to enter *inclosed* lands, the word *several* is dropped, and a power is introduced for surveyors to obtain materials from any land whatever. That section is sufficiently clear. It embraces four distinct descriptions of property. In the first place, it applies to all "gardens, yards, parks, paddocks, planted walks, or avenues to any house, or any piece of ground planted and set apart as a nursery for trees," which are made sacred, and cannot be touched under any circumstances whatever. In the next place, it applies to descriptions of land from which materials may be obtained without any previous sanction or payment of compensation, that is, commons or waste lands, from which materials may be carried away without paying anything for them, and without its being deemed a trespass. The third description of property is inclosed lands, from which nothing can be taken without previous notice to the owner and occupier; and the fourth is land generally, by which I understand land not falling under any of the former categories. It seems to embrace all

descriptions of property except gardens, yards, parks, paddocks, &c. If that be the construction of this clause of the act, it seems to be pretty clear in the present case, that the land in question does not fall under the description of waste or common. It is not waste, but is land employed for feeding sheep: it is not common, for there are no rights of common on it, and it is held in severalty by the plaintiff. It does not fall under the description of inclosed lands, which, for the reasons I have given, seems to apply only to lands inclosed by fences; but it falls under the description of the word *land*, in the middle of the clause, from which materials may be taken on payment for the injury done to the land. A difficulty was suggested in the argument, which may be obviated by the clause being read in a different way from that in which Mr. *Peacock* read it. There is a provision, in case materials are taken from open or common lands, but carried over inclosed lands, that payment is to be made according to the discretion of the trustees. But Mr. *Peacock* suggests that no compensation could be applied for, unless the word "inclosed" is read as being synonymous with the word "private." That depends on the construction of the middle part of the clause, and it seems to me that it may be read so as to obviate that difficulty. All the difficulty arises from the use of the word *such*. The words are—
 "Then it shall be lawful for the said surveyor or surveyors, or such person or persons as he or they shall appoint, to search for, dig, get, gather, take, and carry away any such materials in or out of the land of any person or persons where the same may be had or found, in any parish, hamlet, or place, in which any part of such road shall lie or be situate, or in any adjoining parish, hamlet, or place (not being a garden, yard, park, paddock, planted walk, or avenue to any house or any piece of ground, planted and set apart as a nursery for trees), making or tendering such satisfaction for such materials, and for the damage done to the owners or occupiers of the land where and from

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whence the same shall be dug, gathered, and carried away, or over which the same shall be carried, as the said trustees or commissioners shall judge reasonable." Mr. *Peacock* contends that these words must be limited to the case of materials got on grounds over which they are carried. That depends on the construction of the words *same* and *such*. If those words are taken to refer to the first description of materials, viz., materials for the repair of the turnpike road, (as it seems to me they may), all the difficulty suggested in the argument is got rid of, and the result will be that materials got from commons and public places may be carried over any other common or open ground, without paying anything for them, but if carried over private lands, whether open or inclosed, compensation must be made by the trustees, the amount to be settled by magistrates in case of dispute. Then if that be the result, and it seems to me tolerably clear that it is, this defendant has not been guilty of a trespass. The word "inclosed" is to be taken as meaning inclosed by a proper fence: if the fence were out of repair, that would make no difference. If there be only a very small part that is inclosed with fences, it seems to me that on such lands the surveyor may enter and take materials, but that he is bound to pay for them, and for any injury done to the land by carrying them away, that being provided by the 97th section.

GURNEY, B.—I confess that in an earlier part of the case I felt great difficulty in reconciling myself to the conclusion come to by my Lord Chief Baron and my Brother *Parke*; but when I come to compare the act of Parliament of the 13 Geo. 3 with the present act, and find that the words in the former act were, "*several and inclosed*," while the word *several* is dropped in this act of Parliament, that removes the difficulty which I felt before. Whether this word has been dropped by accident or design it is impossible for us to say with certainty; but we must assume, not finding it there, that it

was the intention of the legislature to omit it in this act of Parliament.

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ROLFE, B.—I am entirely of the same opinion. The only difficulty arises from the uncertainty which prevails whether it was by design that the legislature used a word of very varying import. The legal construction of words is sometimes very different from their popular use. In this case it is said we must construe the words in their legal, and not in their popular sense; but I cannot arrive at that conclusion. There is a sort of scale introduced into the act, as to the mode in which private property may be dealt with. A certain description of private property is rendered sacred: gardens, paddocks, and so forth. Then the next species of property over which it was necessary that protection should be thrown, was inclosed grounds; distinguished from which there is another sort of several property, not inclosed, but lying open, not strictly, perhaps, to be called *private* property. The question is, to what must we suppose the legislature to have directed their attention, when they used the words *inclosed lands*? In one sense all lands are inclosed in the eye of the law, and, in another and more popular sense, only inclosed by fences. I think the act clearly refers to the latter; for it makes a distinction between inclosed lands and private lands, in the 83rd and 96th sections; by the former of which, general powers are given to the surveyors to take all *private* lands for the purpose of improvement in roads, while the latter contains a proviso that in *inclosed* lands they shall not take more than within a given distance. On these grounds, I think our judgment ought to be for the defendant.

Rule absolute to enter a nonsuit (*a*).

(*a*) See now the stat. 4 & 5 Vict. c. 51, whereby it is enacted, that all lands and grounds in the exclusive occupation of one or more persons for agricultural purposes, shall be deemed inclosed lands or grounds

within the meaning of the 3 Geo. 4, c. 126, although not separated from any adjoining lands, or from any highway, by any fence or other inclosure.

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Jan. 21.

Brewer's casks sent to a public-house with beer, and left there until the beer is consumed, are liable to be distrained for the rent of the house.

JOULE v. JACKSON.

TROVER for brewer's casks. Plea, not guilty (by statute).

At the trial before *Rolfe*, B., at the last Summer Assizes at Liverpool, it appeared that the action was brought to recover the value of four half-barrels, sold under a distress for the rent of a public-house, where they had been deposited by the plaintiff, a brewer at Salford, until the beer which they contained should have been consumed. At the time they were distrained three of them were empty and one full; all of them being marked "Benjamin Joule, Salford." It was proved to be a custom in the trade, that whenever beer is purchased by a publican, the barrels are supplied without any charge being made for them by the brewer, on whom devolves all liability arising from any defect in the casks; and that it was usual to call for the empty casks at certain periods, which were always returned to the brewery. According to the evidence of several witnesses who were well acquainted with the trade, it would be very injurious, both to the brewing and retail business, if publicans were obliged to furnish their own casks, or to purchase them from the brewer. The jury found, that if the distress were allowed, the trade of a brewer could not be carried on; and under the direction of the learned Judge, the plaintiff had a verdict with 40*s.* damages, leave being reserved to move to enter a nonsuit. *Wightman* having, in Michaelmas Term last, obtained a rule accordingly,

Cresswell, *Cowling*, and *Hoggins* now shewed cause.— This case is within the principle of the authorities in which it has been held that the goods were exempted for the benefit of trade. That principle is, that where the goods are delivered to a person in the way of his trade, such delivery

being necessary, they are exempted from distress, such exemption being for the public good. This case is distinguishable from *Muspratt v. Gregory* (a), because in that case there was no delivery to the trader, and no necessity that there should be any. The exemption does not depend on the question whether the tradesman obtains a lien on the goods or not. In Co. Litt. 47. a. it is said —“ Valuable things shall not be distrained for rent for benefit and maintenance of trades, which by consequent are for the commonwealth, and are there by authority of law; as a horse in a smith’s shop shall not be distrained for rent issuing out of the shop, nor the horse, &c., in the hostry, nor the materials in the weaver’s shop for making of cloth, nor cloth or garments in a tailor’s shop, nor sacks of corn or meal in a mill, nor in a market, nor anything distrained for damage feasant, for it is in the custody of the law, and the like.” Amongst the exemptions there mentioned, are not merely goods delivered to a tradesman to be wrought, who would have a lien upon them, but goods in a market-place, where there would be no lien. In *Adams v. Grane* (b), goods sent to an auctioneer to be sold on premises occupied by him, were held to be privileged from distress. In that case, *Bayley, B.*, in answer to the argument that the exemption applied only to cases where the party had a lien, says (c)—“ Suppose I send corn to a mill to be ground on a special contract for payment at the end of six months, could that be distrained? There would be no lien there.” If the only objection were that the tradesman had a lien, the party might pay the charge, and take the goods under the distress. The real ground and basis of the exemption is, that it is for the benefit of trade, and for the public convenience. It is so put in Co. Litt., & Gilb. on Distresses, 36. The same principle is laid down in 3 Blac. Comm. 7. And

(a) 1 M. & W. 633; S. C. in error, 3 M. & W. 677.

(b) 1 C. & M. 380.

(c) Page 384.

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Bayley, J., in *Adams v. Grane(a)*, says,—“Lord Coke treats of it as being well known; and the principle of exemption, according to him, is, that it is for the benefit of trade. Among other instances put by him, is the instance of ‘goods going to a fair or market.’ Now, why should they be privileged? They are privileged because *interest reipublicæ* that buyer and seller should be brought together, that a man should have an opportunity of going to some particular place, to which goods might be brought for the purpose of sale.” The present case comes within, and is consistent with, that rule. Here the jury have found that the trade of a brewer could not be carried on without using the casks supplied by the brewer. [*Parke, B.*—Surely the publican could send his own casks.] In the instance of corn sent to a mill to be ground, the miller has nothing to do with the sacks, and they might as well, therefore, be taken back; and yet they are held to be privileged. [*Parke, B.*—All the cases which have been cited are where the person to whom goods are sent has the exemption for his own benefit; but here it is not so. It is the *brewer’s* trade that cannot be carried on.] No; it was proved that neither could be carried on. [*Parke, B.*—The benefit of trade of the person sending the article is immaterial: it is the benefit of the trade of the person to whom it is sent, which is to be considered.] In *Com. Dig., Distress, (C.)*, it is said of things which are not distrainable—“Nor any goods delivered to any person in the way of his trade;” for which 1 Salk. 250, is cited. That was the case of *Gisbourn v. Hurst*, where the Court extended the exemption to goods delivered to a person carrying on the business of a carrier to be carried for hire; and the Court said—“for the law has given the exemption in favour of the trader, and not in respect of the carrier.” The Court there say, that goods delivered to any person exercising a public trade or employment, to be

carried, wrought, or managed in the way of his trade or employment, are for the time under a legal protection, and privileged from distress for rent. The phrase, "to be wrought or managed," is used for the first time in that case; but it was not necessary for the Court to give such a definition. Those words are again used in *Simpson v. Har-topp* (a); but the only question there was, whether implements of trade, which are in actual use at the time, were privileged, and the definition was not necessary to the decision. [Parke, B.—I believe *Gisbourn v. Hurst* will be found to be the only case where goods are said to be privileged on the ground of benefit to the trade of the person sending them.] The general principle is, that it is for the benefit of trade in general; but in the instance of the horse sent to the smith's shop, it cannot be said to be for the benefit of all persons, but only of those who keep horses. So in the case of agistment, the grazier only has the benefit. Here there is a direct benefit both to the publican and the brewer. Lord C. B. Comyns draws the conclusion, that the privilege is to extend to "any goods delivered to any person in the way of his trade;" and there is no authority against it. *Francis v. Wyatt* (b) may be cited on the other side; but if that case be looked at, it in truth decides nothing at all. The facts do not appear from the pleadings; but it is clear that it was not the ordinary case of sending a carriage to livery, but that of a person taking premises for a year; as was said by Bayley, B., in *Adams v. Grane* (c). *Wood v. Clarke* (d) is also clearly distinguishable from the present case, because there it was not found that the exemption was necessary for the protection of the trade. Here the barrels were delivered to be used by the publican in the way of his trade; it was for the benefit of both parties, and so for the benefit of the trade in general: and the jury have found

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(a) Willes, 514.

(c) 1 C. & M. 381.

(b) 3 Burr. 1498; 1 Sir W. Bl.

(d) 1 Cr. & J. 484.

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that it was necessary that such a privilege should exist. In *Muspratt v. Gregory*, the boat being sent to the premises to be loaded with salt, was left there for the owner's convenience, and was not delivered into the custody of the tenant of the premises; and the decision in that case is quite consistent with what has been urged in the present case. [*Parke*, B. —The Judges there said, that they would not extend the principle beyond the cases already decided.] The right of the landlord to distrain the goods of his tenant is an artificial, not a natural right: if the right was originally granted for the public convenience, it ought also to be limited for the protection of trade. In *Gilman v. Elton* (a), *Richardson*, J., in answer to the argument that the goods ought to undergo some alteration in the hands of the trader, says (a) —“ It is not necessarily so, for a carrier does not operate upon goods, except to carry them; and the very words of the decision in *Gisbourn v. Hurst* include carrying or managing. The advancement of trade equally requires that the goods should be placed in the hands of a factor for sale, as that they should be placed in the hands of a carrier for carriage:” and he adds, “ it would be highly injurious if goods so sent for sale were liable to be distrained for the private debt of the factor.” If the trade of a brewer cannot be carried on without sending out his casks to the publican's house, neither can the trade of the publican; it is equally essential to the business of both; it is, therefore, for the convenience of the public weal, and if that is to be protected, this exemption from distress ought to be allowed.

LORD ABINGER, C. B.—It is too late at this day to enter into the principles of the law as to the landlord's power to distrain, where the case does not fall within any of the decisions on the subject; it having been determined by the majority of this Court, and afterwards by a Court of error, that the principle of those decisions ought not to be ex-

(a) 3 B. & B. 84.

tended. If a cooper had had the casks in his possession, for the purpose of repairing them in the way of his trade, they would have been exempted from distress. All the cases are analogous to that. But here nothing is to be done to the casks, which are merely left with the publican till they are empty. That is very different from the case of an article left for repair. The case of *Muspratt v. Gregory* was much nearer the present; but there it was said, that the principle of exemption ought not to be carried further. If we were to extend the principle to a case like the present, we should get into too wide a sea; and it is, therefore, better to adhere to the decided cases.

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PABKE, B.—I am entirely of the same opinion. A landlord has a right to distrain all goods found upon the demised premises, with the exception of certain specified cases, which are not to be extended. *Primâ facie*, every deposit of goods upon the premises where the trade is carried on, would have relation to that trade, and an exemption from distress would, in that view, be for the public good. But to hold all such goods to be exempt, would be establishing a very wide principle; and the case of *Muspratt v. Gregory* having decided that the principle of exemption already laid down in the books ought not to be extended, we are bound by that decision. The rule, therefore, must be absolute to enter a nonsuit.

ROLFE, B., concurred.

Rule absolute.

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THOMPSON v. GIBSON and Another.

Jan. 22.
Action on the case for continuing a nuisance to the plaintiff's market, by a building which excluded the public from a part of the space on which the market was lawfully held. It appeared that the building was erected in October 1838, under the superintendence and direction of the defendants, not on their own land, but on that of the corporation of K. (of which corporation they were members). The Earl of L. was the owner of the market in October 1838, and, in February 1839, he demised it to the plaintiff; and the market being afterwards obstructed by the building, this action was brought:—*Held*, that the defendants were liable for continuing the nuisance, although they had no right to enter upon the land to remove it, and that the action was therefore maintainable.

THIS was an action on the case for continuing a nuisance to the plaintiff's market, by a building which excluded the public from a part of the space on which the market was held. The defendants pleaded not guilty. A new trial had been granted; and on the second trial of the cause, before *Coltman, J.*, at the last Assizes for Westmoreland, the defendants' counsel took an objection, that the action could not be maintained. It appeared that the building was erected in October 1838, under the superintendence and direction of the defendants, though not on their own land, but on that of the corporation of Kendal, (of which they were members), and that it had continued there, obstructing the market, until after the commencement of this action. Lord Lonsdale was the owner of the market in October 1838, and in February 1839, he demised it to the plaintiff; and the market being afterwards obstructed by the building, this action was brought. The defendants contended, that, under these circumstances, they were not responsible for the continuance of the nuisance; that they were distinct persons from the corporation; and that, though they were guilty of erecting the nuisance, they could not be considered as having continued it, because they were not in possession of or interested in the soil on which the building was erected. The learned Judge overruled the objection, but reserved the point.

Dundas having, in Michaelmas Term last, obtained a rule to enter a nonsuit,

Cresswell, Alexander, and Cowling, in the same term, shewed cause.—The defendants have directed that to be done which the jury have found to be a nuisance. As-

suming that they were acting for themselves, there can be no doubt that they would be responsible for the nuisance; and the case is not altered by the fact, that the defendants were, at the time of the erection of the nuisance, members of a corporate body. That could not affect the plaintiff's right of action against the individuals who have directed the nuisance to be created; as, for a tort the individual is always liable: *Wilson v. Peto* (a). In *Stone v. Cartwright* (b), which was an action against the manager of a mine for damage done by the negligence of persons who were employed by him in the service of his principal, it was held, that the principal, or those actually employed, were alone liable. *Lawrence, J.*, there points out the distinction between that case and the present. He says, "If the plaintiff had given evidence that the defendant had particularly ordered those acts to be done from whence the damage had ensued, that would have varied the case." It must therefore be taken to be, and is, the same as if the defendants had erected this building with their own hands. Now it is clear that an action might have been maintained by the then owner of the market for the immediate injury; but it is said, that though the defendants were guilty of erecting the nuisance, they are not liable for its continuance, because they are not in possession of or interested in the soil on which the nuisance stands. The case of *Rosewell v. Prior* (c) is in point as to this objection. There a tenant for years erected a nuisance, and afterwards made an under lease of the premises. The question was, whether, after a recovery against the first tenant for years for the erection, an action would lie against him for the continuance after he had made an underlease. It was held, that the action would lie; "for he transferred it with the original wrong, and his demise affirms the continuance of it." In *Some v. Barwisk* (d), it

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(a) 6 Moore, 47.

(b) 6 T. R. 411.

(c) Salk. 459.

(d) Cro. Jac. 231.

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was held, that for a nuisance erected in the time of the deviser, and continued afterwards, the devisee shall join in the action; for the continuance thereof is a new erection of such nuisance. The defendants, therefore, are liable to the plaintiff as lessee, as for a new nuisance. [*Parke, B.*—The defendants, not being in possession of the soil, have no power to remove the nuisance.] A party cannot excuse the continuance of a wrong by saying that he has no power to remove it. That is the result of the original wrongful act, for which he is responsible.

Dundas, W. H. Watson, and Ramshay, contra.—The action is brought for an injury to this market by continuing a building, and not for the erection of a nuisance; but the defendants cannot be liable for an injury they have not committed, nor for the continuance of a building over which they have no control. If they were to remove the building, they would be guilty of a trespass, and liable to an action. If the argument on the other side is to prevail, even the carpenter who did the wood-work of the building will be liable for the continuance of it. In *Wilson v. Peto*, the question was, whether the defendant was a person who could be fixed with the act itself? And in *Stone v. Cartwright*, the defendant was interested in the nuisance. *Rosewell v. Prior* is more fully reported in 12 Mod., 639, where the Court say, that “if the alienee of the land brought an action against the erector, and the erection had been before any estate in the alienee, the question would be greater, because the erector never did any wrong to the alienee.” In *Rex v. Pedley (a)*, it was held, that if the owner of land erect a building which is a nuisance, or of which the occupation is likely to produce a nuisance, and let the land, he is liable to an indictment for such nuisance being

(a) 1 Ad. & Ell. 822; 3 Nev. & M. 627.

continued or created during the term; but the reason of that decision was, that the landlord had or ought to have reserved a right of entry, for the purpose of preventing the premises from becoming a nuisance; but these defendants have no means whatever of removing this nuisance. They therefore are not liable.

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Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—This was an action on the case for continuing a nuisance to the plaintiff's market by a building, which excluded the public from a part of the space on which the market was lawfully held. There was a plea of not guilty, on which the question arises.

A new trial had been already granted in this case. On the second trial, the defendants' counsel took an objection that the action would not lie against them. It appeared that the building was erected under the superintendence and direction of the defendants, though not on their own land, but that of the corporation of Kendal, of which corporation they were members, and it had continued there, obstructing the market, until after the commencement of the action. The building was erected in October, 1838. Lord Lonsdale was the owner of the market, and demised it to the plaintiff after that time, namely, in February, 1839; and the market was afterwards obstructed by the building.

It was contended, under these circumstances, that the defendants were not responsible for the continuance of the nuisance; that they were distinct persons from the corporation; and that though they were guilty of erecting, they could not be considered as having continued the nuisance, because they were not in possession of or interested in the soil on which the building was erected.

My Brother *Coltman* overruled this objection, but re-

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served the point; and a rule nisi having been granted to enter a nonsuit, and cause shewn, we have now to decide whether the objection was well founded or not; and we are all of opinion it was not. That the defendants were responsible for some consequences of the original erection of the building to the then owner of the market, though the defendants were not acting for their own benefit, but for that of the corporation, is not disputed; nor could it be. If they are considered merely as servants of the corporation, they would be liable, just as the servant or an individual is if he is actually concerned in erecting a nuisance; *Wilson v. Peto*: and as they would clearly have been responsible to the then owner of the market for the immediate consequences of their wrongful act, how can their liability be confined to the injury by the interruption of the first market, or what other limit can be assigned to their responsibility other than the continuance of the injury itself? Is he, who originally erects a wall by which ancient lights are obstructed, to pay damage for the loss of the light for the first day only? or does he not continue liable so long as the consequences of his own wrongful act continue, and bound to pay damages for the whole time? and if the then owner of the market might have maintained an action against the defendants for the injury to his franchise, for the whole period during which the defendants' act continued to be injurious to him, his lessee must be in the same condition as to subsequent injuries; for it is clearly established that he has a right of action for every continuing nuisance: and to that effect is the authority of Roll's Abr., Nuisance, K. 2. "If one is seised of land near a river, and another stops it with loads of earth, and the tenant of the land adjoining leases to another for years, and then the stoppage continues, by which the land of the lessee is surrounded, the lessee shall have an action on the case against him; for though the stoppage was in the time of his lessor, the continuance was a wrongful

damage to the lessee, for his land was surrounded." That is the case of *Westburne v. Mordant* (a): and in like manner, *Penruddock's case* (b) shews that a feoffee may bring a quod permittat for a nuisance, erected in the time of the feoffor, against him who did the wrong; and an action on the case is a substitute for this old writ. And further, in the case of *Some v. Barwish* (c), it was held that the devisee might sue for a nuisance erected in the time of the devisor, and continued afterwards; for the continuance is as the new erecting of such a nuisance. In the case of *Rosewell v. Prior* (d), which was an action against the defendant, who erected an obstruction to the ancient lights of the plaintiff, and then aliened, Lord Holt lays it down, that "it is a fundamental principle in law and reason, that he that does the first wrong shall answer for all consequential damages; and here," he says, "the original erection does influence the continuance, and it remains a continuance from the very erection, and by the erection, till it be abated." And he adds, "that it shall not be in his power to discharge himself by granting it over." It is true that Lord Holt afterwards says, "that if the alienee of the land brought an action against the erector, and the erection had been before any estate in the alienee, the question would be greater, because the erector never did any wrong to the alienee." Lord Holt, however, does not intimate that the action would not lie; and the authority above cited, as well as the principle, that the assignee or lessee ought to enjoy the estate as fully as the assignor or lessor, and has a similar claim to compensation for the injury during his own time, shews that the action will lie. What is said in this and the other reports of this case as to the assignment of the nuisance affirming the continuance, appears to us to be given by way of additional reason. It was argued, however, that the assignee or lessee was not without remedy: he might abate the

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(a) Cro. Eliz. 191.

(b) 5 Rep. 100, b.

(c) Cro. Jac. 231.

(d) Salk. 459; 12 Mod. 639.

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nuisance; but that affords no compensation in damages, and may, in some cases, be an expensive remedy; or he might maintain an action against the corporation who receive the rents of the building, or the tenants who occupy, as appears by the case of *Rippon v. Bowles (a)*; but that case shews that he is not bound to pursue that remedy, but may sue the original wrongdoer. It was also said that the defendants could not now remove the nuisance themselves, without being guilty of a trespass to the corporation, and that it would be hard to make them liable. But that is a consequence of their own original wrong; and they cannot be permitted to excuse themselves from paying damages for the injury it causes, by shewing their inability to remove it, without exposing themselves to another action. We are therefore of opinion that the action is maintainable, and the rule must be discharged.

Rule discharged.

(a) Cro. Jac. 373.

AMLOT v. EVANS and Others.

Jan. 23.

Service of a rule to compute principal and interest on a bill of exchange or promissory note, upon one of several defendants, is sufficient, as service upon one is service upon all.

STREETEN moved to make a rule absolute for computing principal and interest on a promissory note, on an affidavit of service. It appeared that there were four defendants in the action, but the rule had been served upon two only, on which ground the Master had objected to the sufficiency of the affidavit. *Streeten* contended that the objection was not a valid one, and that it had been so decided in *Figgins v. Ward (a)*. There, in an action on a promissory note against three defendants, who suffered judgment by default, it was held that service of the rule on one was

(a) 2 C. & M. 421.

service on all; and *Bayley*, B., said—"By suffering judgment to go by default, the defendants acknowledge a joint cause of action, and therefore, *quoad hoc*, they are partners."

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PARKE, B.—Yes; that is an authority in point. The service is sufficient, and the rule may be made absolute.

Rule absolute.

EVANS v. MANERO.

DEBT for sheriff's poundage. The declaration stated, that after the making of a certain act of Parliament, made and passed in the reign of our Lady Elizabeth, late Queen of England, intituled "An act to prevent extortion in sheriffs, under-sheriffs, and bailiffs of franchises or liberties, in cases of execution," and before the commencement of this suit, to wit, on &c., the now defendant sued and prosecuted out of the Court of our Lady the Queen, before the Barons of her Exchequer at Westminster, &c., a certain writ of our Lady the Queen called a *capias ad satisfaciendum*, directed to the sheriffs of London, whereby the sheriffs of London were commanded to take John Reckless the younger, if he should be found in their bailiwick, and him safely keep, so that they should have his body before the Barons of our Lady the Queen's Exchequer at Westminster, immediately after the execution thereof, to satisfy the now defendant as well a certain debt of 1724*l.* 5*s.* 10*d.* which the said now defendant then lately, in the borough Court of Liverpool, by the judgment of the said Court, recovered against the said John Reckless, as also 4*l.* 16*s.* 8*d.* which were adjudged to the said now defendant in the said Court for his damages which he had sustained, as well on occasion of detaining the said debt as for for his own costs and charges by him about his

Jan. 23.

A writ of *ca. sa.* was indorsed by mistake for a larger sum than the amount really due, and after the debtor had been taken in execution, the mistake was corrected by a Judge's order:—*Held*, that the sheriff's claim for poundage must be regulated accordingly, and that he was only entitled to poundage upon the debt really due.

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suit in that behalf expended ; whereof the said John Reckless was convicted, as appeared to our said Lady the Queen by the certificate of register of the said borough Court of Liverpool ; and on which judgment, in pursuance of the statute in such case made and provided, it was by an order dated the 7th day of May then instant, made by Sir Robert Mounsey Rolfe, one of the Barons of our Lady the Queen's said Court of Exchequer, ordered that a writ or writs of execution might issue out of our said Lady the Queen's Court of Exchequer of Pleas for the amount of such judgment, with costs of and occasioned by the application for the said order, to be taxed by the Master of the said Court of Exchequer, together with the costs of execution, and which said costs of and occasioned by the said application for the said order, were, on &c., taxed and allowed by the said Court, before the barons of our said Lady the Queen's Exchequer at Westminster, at the sum of 3*l.* 7*s.*; and further to satisfy the said now defendant the sum of 3*l.* 7*s.*, together with interest upon the several sums of 1724*l.* 5*s.* 10*d.*, 4*l.* 16*s.* 8*d.* and 3*l.* 7*s.*, at the rate of £4 per cent. per annum, from &c., and to have there then that writ. And afterwards, and before the delivery of the said writ to the plaintiffs as hereinafter mentioned, to wit, on &c., the defendant, by a certain indorsement on the said writ, directed and marked on the back of the said writ, that the said sheriffs should take 1732*l.* 9*s.* 6*d.*, and interest thereon, from &c., till paid ; that the said writ so indorsed as aforesaid, afterwards, and before the commencement of the suit, to wit, on &c., was delivered to the plaintiffs, who then, and until and after the arrest of the said John Reckless, were sheriffs of the city of London, to be executed in due form of law. And the plaintiffs, being such sheriffs as aforesaid, afterwards, and after the delivery of the said writ to them as aforesaid, and during the continuance of their said shrievalty, and before the commencement of this suit, to

wit, on &c., in &c., and within their bailiwick, as such sheriffs as aforesaid, and by virtue and in pursuance and in command of the said writ, they arrested the said John Reckless by his body, and had and detained him in their custody, in due form of law, in execution for the debt and damages aforesaid, according to the exigency of the said writ, and the said indorsement so made thereon as aforesaid: whereby, and by force of the statute in such case made and provided, the said now defendant became and was liable to pay to the plaintiffs, and an action had accrued to the plaintiffs, as such sheriffs as aforesaid, to demand and have of the said now defendant the sum of 45*l.* 16*s.*, that is to say, twelve pence of and for every twenty shillings of £100, part of the debt and damages aforesaid, and so marked on the back of the said writ as aforesaid, and sixpence for every twenty shillings of the residue of the said sum so marked on the back of the said writ as aforesaid, being over and above the said sum of £100. Breach, that the defendant had not paid the same.

Plea, as to the cause of action in the declaration mentioned, except as to the sum of 6*l.* 9*s.* 6*d.*, parcel of the money thereby demanded, the defendant says, that the said judgment recovered by the now defendant in the borough court of Liverpool, mentioned in the writ of *capias ad satisfaciendum* in the declaration in this cause particularly set forth, was so recovered by the now defendant against the said John Reckless, upon and by virtue of an order of the said borough court of Liverpool, made by the said Court, to wit, on &c., and whereby, upon hearing the attorney for the now defendant and the said John Reckless in person, and by consent, it was ordered by the said borough Court that all proceedings in that action should be stayed, and that the plaintiff therein should be at liberty to sign final judgment for the sum of 172*l.* 5*s.* 10*d.*, for the purpose of securing the due and punctual payment of the following promissory notes (the

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plea then set out three notes, one of which was for £150, and two others for £25 each). And it was thereby also ordered, that any execution to be issued by virtue of that rule should be merely to secure the amount of such of the said promissory notes as should be due at the time of issuing such execution, together with the costs of judgment, officers' fees, and all other incidental charges thereon; nevertheless, in case of the bankruptcy or insolvency of the defendant in that action before payment of the said notes, or any or either of them, the plaintiff therein was to be at liberty to prove under the estate of the defendant in that action for the sum of 1724*l.* 5*s.* 10*d.*, or so much thereof as should be due at the time of such bankruptcy or insolvency, the said several promissory notes having been accepted by the plaintiff in that action, from the defendant therein, as a composition of the said sum of 1724*l.* 5*s.* 10*d.*; as by the said order, remaining in the said borough court of Liverpool, reference being thereunto had, will fully appear: That at the time of the making of the said order of the said Sir Robert Mounsey Rolfe in the declaration mentioned, and also of the issuing of the said writ of *capias ad satisfaciendum* in the declaration mentioned, the real debt *bonâ fide* due to the now defendant, and for which he the now defendant was entitled to issue execution upon the said judgment, amounted to the sum of 150*l.* 5*s.* 10*d.* and no more, together with 4*l.* 16*s.* 8*d.* being the costs of the said judgment, and also the costs of and occasioned by the application for the said order, with the costs of execution, which said costs of and occasioned by the said application for the said order were, to wit, on &c. in the said declaration in that behalf mentioned, taxed and allowed at the sum of 3*l.* 7*s.*, as in the declaration mentioned. But the now defendant in fact saith, that after the issuing of the said writ of execution in the declaration mentioned, and before the delivery thereof to the plaintiffs, as such sheriffs as in the said declaration

mentioned, to wit, on &c., in the declaration in that behalf mentioned, the now defendant, by mistake and misapprehension, caused the said indorsement in the declaration mentioned to be made on the said writ, whereby it was directed that the said sheriffs should take 1732*l.* 9*s.* 6*d.* and interest thereon from &c., till paid, whereas the now defendant should and ought by the indorsement to have directed the sheriffs to take 158*l.* 9*s.* 6*d.* and interest thereon from &c., till paid, and no more. And the now defendant further says, that immediately after the arrest of the said J. R. by the said sheriffs under and by virtue of the said writ of execution as in the said declaration mentioned, and whilst the said J. R. was in the custody of the said sheriffs under and by virtue of the said writ, the said mistake in the said indorsement was discovered by the now defendant, whereupon the now defendant then caused such proceedings to be taken by virtue of the said execution in the said action, before the said Sir Robert Mounsey Rolfe, then being one of the Barons of her Majesty's Exchequer, that it was afterwards to wit, on &c. in due manner ordered by the said Sir Robert Mounsey Rolfe, that the now defendant should be at liberty to amend the said indorsement upon the said writ of *capias ad satisfaciendum*, by reducing the sum of 1732*l.* 9*s.* 6*d.* indorsed thereon as aforesaid, to 158*l.* 9*s.* 6*d.* : as by the said order, reference being thereunto had, will more fully appear; which said last-mentioned order is still in full force and effect, and hath not been in any manner reversed, annulled, or vacated. And the now defendant further saith, that afterwards, to wit, on &c., he the now defendant caused the said order to be in due manner served upon the said sheriffs, and also then caused the said indorsement on the said writ to be amended, and the same then was amended, under and by virtue of the said last-mentioned order, that is to say, by reducing the sum of 1732*l.* 9*s.* 6*d.* indorsed on the said writ of execution, to the

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said sum of 158*l.* 9*s.* 6*d.*; and thereupon, by the said amended indorsement on the said writ of execution, it was directed and marked on the back of the said writ, that the said sheriffs should take 158*l.* 9*s.* 6*d.* and interest thereon from &c., until paid, which said sum of 158*l.* 9*s.* 6*d.* was the real debt bonâ fide due and claimed by the now defendant against the said J. R. under and by virtue of the said execution. And the now defendant further saith, that the amendment was so made in the said indorsement on the said writ as aforesaid, to wit, on &c. last aforesaid, during the continuance of the shrievalty of the now plaintiffs, and before the commencement of this suit, and whilst the said J. R. was in the custody of the now plaintiffs as such sheriffs as aforesaid, under and by virtue of the said writ, and that thereupon and thereby the now plaintiffs as such sheriffs as aforesaid detained the said J. R. in their custody, under and by virtue of the said writ, in execution for the monies so mentioned in the said amended indorsement on the said writ, and for no other or greater sum of money. And the defendant in fact saith, that the plaintiffs, so being such sheriffs as aforesaid, were not prejudiced by the said mistake so committed in the said indorsement as aforesaid:—By reason of which said several premises, the now defendant became and was liable to pay the plaintiffs, by force of the statute in such case made and provided, poundage for the said monies so mentioned in the said amended indorsement, and thereby marked and specified on the back of the said writ, that is to say, the sum of 158*l.* 9*s.* 6*d.*, and for no other or greater sum, and which said poundage for the said last-mentioned monies amounted to a certain sum of money, to wit, the sum of 6*l.* 9*s.* 6*d.*, and was and is the sum of 6*l.* 9*s.* 6*d.* in the introductory part of this plea mentioned. Verification.

General demurrer, and joinder.—The point marked for argument on the part of the plaintiffs was, that the plea did not disclose any defence to the claim of poundage on the whole sum marked on the writ.

W. H. Watson, in support of the demurrer.—The sheriffs are entitled to poundage upon the sum which was originally indorsed upon the writ. By the stat. 29 Eliz., c. 4, sheriffs are entitled to twelve pence for every twenty shillings where the sum does not exceed £100, and sixpence for every twenty shillings being over and above the sum of £100, that he or they shall levy or extend and deliver in execution, or take the body in execution for, by virtue and force of any extent or execution whatsoever. There can be no doubt that under that statute sheriffs are entitled to poundage upon the whole amount for which the party is taken in execution. In Com. Dig. tit. Viscount (F. 1), it is said—"If there be execution by ca. sa., the sheriff shall have his fees for the whole debt:" and again, "Though the writ be erroneous, he shall have his fees." The stat. 3 Geo. 1, c. 15, s. 17, after reciting that 'it often happens that small sums only are remaining due upon judgments, &c., and nevertheless, upon executing writs of *capias ad satisfaciendum*, the sheriff demands and takes for his fees, poundage for the whole money for which such judgments, &c. are entered,' enacts, "that poundage shall in no case be demanded or taken upon executing any writ of *capias ad satisfaciendum*, or upon charging any person in execution by virtue of such writ, for any greater sum than the real debt *bonâ fide* due and claimed by the plaintiff amounteth unto, which sum the plaintiff shall be and is hereby obliged to mark and specify on the back of such writ, before the same be delivered to the sheriff to be executed." The sheriff is only entitled to poundage, therefore, on the debt really due and claimed by the plaintiff; but the sheriff cannot know what is the amount really and *bonâ fide* due, and it is the plaintiff's duty to indorse that amount on the writ, and the sheriff is bound to levy accordingly. Here a writ is delivered to the sheriffs, indorsed with the amount of the judgment, which they cannot dispute; and it is no answer to say that a mistake was made

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in the indorsement. In *Earle v. Plummer* (a), it was expressly held, that if a writ be delivered to the sheriff, and he executes it, he shall have his fees though the writ be erroneous. That shews that although the plaintiff has committed an error, he cannot set it up as an answer, but must pay the fees. So if a sheriff levy under a *fi. fa.*, he is entitled to his poundage, though the parties compromise before any of the goods are sold; *Alchin v. Wells* (b). In *Rawstorne v. Wilkinson* (c), where the sheriff levied under a *fi. fa.* and received the money, and afterwards the judgment and execution being set aside for irregularity, and the money ordered to be returned, he paid it back with the assent of the plaintiff; it was held that his remedy by action of debt against the plaintiff for his poundage was not taken away. That case is in point, and is a strong authority in favour of the plaintiffs. Here the effect of the Judge's order was to set aside the execution *pro tanto*; but still the sheriff is entitled to his poundage for the sum which was indorsed upon the writ which he has executed.

Martin, contra.—The right of the sheriff to poundage arises from no contract with the party, but from the execution of his duty as sheriff, and the statute provides the compensation which he is to have for the risk incurred. In the event of an escape, the sheriff would only be liable for the amount really due from the defendant in the original action, and not for the sum erroneously indorsed upon the writ. The remedy by action of debt for an escape was given by the statutes of Westminster 2, 18 Edw. 1, c. 11, and 1 Ric. 2, c. 12; and in *Bonafous v. Walker* (d), *Buller*, J. says—“The sense of these statutes is, that the party who suffers by the escape shall have the same remedy against the gaoler which he had against the debtor. But he cannot

(a) Salk. 332.

(c) 4 M. & Selw. 256.

(b) 5 T. R. 470.

(d) 2 T. R. 162.

recover more than he could have recovered against such original debtor ; and the debtor in this case would have been entitled to be discharged on paying what was really due." The cases cited for the plaintiffs are not applicable. *Earle v. Plummer* was the case of an irregular writ, and the sheriff would be entitled to his poundage, because he would be liable in the event of an escape, unless the writ was set aside for irregularity, as he could not say, in an action brought against him for an escape, that the writ was void. In *Alchin v. Wells*, the sheriff had incurred a responsibility by making the levy, and the subsequent agreement between the parties could not deprive him of his poundage, which he had become entitled to for that responsibility. So also, in *Rawstorne v. Wilkinson*, the judgment and execution were set aside for irregularity ; but the sheriff had incurred a responsibility, and it was just that he should receive his remuneration. But in the present case the sheriffs never incurred any responsibility beyond the sum of 158*l.* 9*s.* 6*d.*, the amount really remaining due. The stat. 3 Geo. 1, c. 15, s. 17, is conclusive in favour of the defendant ; for it limits the right to poundage to the debt really and bonâ fide due. In the case where a judgment is signed for the penalty of a bond conditioned for the payment of a smaller sum, the sheriff is not entitled to poundage upon the amount of the penalty, but upon the sum really due. [*Parke, B.*—By the statute, the plaintiff is to mark on the back of the writ the sum really due ; and if the sheriff takes poundage on a greater sum, he is liable to extortion. Suppose the plaintiff directs the amount of the penalty to be levied, is not the sheriff to do so ? What is there to guide the sheriff but the indorsement ? According to your argument, the sheriff would be liable for extortion.] It is not necessary to contend for that. The case of a sheriff coming to insist upon a demand to which he is not entitled, is different from that of a party seeking to make the sheriff liable for extortion by reason of a mistake in the indorsement on the writ.

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[*Parke, B.*—The meaning of the statute is, that the amount to which the sheriff is entitled is to be measured by the sum really due; and the sheriff can only know what is due by the indorsement. *Lord Abinger, C. B.*—Suppose the plaintiff in an action obtained judgment for a certain sum, and by mistake indorsed a larger sum on the writ of execution; in an action for an escape, he would have to set forth the judgment, and could not recover more than the amount of the judgment. Or suppose the judgment by mistake to have been entered up for more than was due or recovered at the trial, and execution was issued for that amount, and afterwards the plaintiff applied to the Court and corrected the error by reducing the amount, in an action against the sheriff for an escape, he surely would be liable only for the amount really due.]

Watson, in reply.—Take the case as it stood on the day of the arrest in execution, and suppose the defendant in the action had escaped the day after, and the plaintiff had brought his action against the sheriffs on that day, the sheriffs would have had no means of examining the correctness of the judgment or indorsement on the writ, and must have had judgment against them for the amount indorsed on the writ; and they are therefore entitled to their poundage upon the sum directed to be levied. If indeed the amount indorsed upon the writ were more than the amount of the judgment, the sheriffs would only be entitled to poundage upon the amount of the judgment; but in this case there is a judgment for the whole amount indorsed upon the writ. The sheriffs were bound to obey the writ, and to execute it according to its terms. They could not come to the Court to alter the indorsement by the judgment, which would be conclusive against them. In an action for an escape, the declaration sets out the judgment and the writ delivered to the sheriff; and if the judgment and the writ correspond therewith, they would be conclusive against

him. The defendant might shew that less was due, but the sheriff has no right to do so. The right to poundage arises on the making of the arrest, and cannot be affected by anything which takes place afterwards.

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LORD ABINGER, C. B.—I have always thought that where the sheriff is charged in debt for an escape, he stands in the same situation as the defendant in the original action; and if so, he is entitled to all the equities which the latter would have had against the plaintiff, and may shew the real merits of the case, and to what extent the defendant was liable. Then his right to poundage is to be measured by his liability. The Court, however, will take time to consider.

PARKE, B.—I have some difficulty in saying that, in an action for an escape, the plaintiff is not entitled to recover the amount of the judgment as originally indorsed upon the writ. No doubt the Court would exercise an equitable jurisdiction over the matter, and the sheriff might shew that part of the debt had been paid, but that is entirely a collateral proceeding.

Cur. adv. vult.

The judgment of the Court was now delivered by—

LORD ABINGER, C. B.—We have considered this case, and are of opinion that the sheriffs are not entitled to poundage on the sum originally indorsed upon the ca. sa. It appears that the indorsement on the writ was, by mistake, of a greater sum than the amount really due; and the plaintiffs claim poundage in respect of the sum so indorsed. Now, by the statute 3 Geo. 1, c. 15, s. 17, it is enacted, “that poundage shall in no case be demanded or taken upon execution of any writ of capias ad satisfaciendum, &c., or upon charging any person in execution by virtue of such writ, for any greater sum than the real debt bonâ fide due and claimed by the plaintiff amounteth

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unto, which sum the plaintiff shall be and is hereby obliged to mark and specify on the back of such writ before the same be delivered to the sheriff to be executed." The claim of the sheriff for poundage is plainly limited to an amount calculated with reference to the sum really due; and although the amount actually indorsed may, *prima facie*, be the basis of that calculation, yet if an indorsement be made by mistake, and that mistake be corrected, the sheriff's claim must be regulated accordingly.

Judgment for the defendant.

LAIRD v. PIM and Another.

Jan. 18, 20.

Where a party has been let into possession of lands under a contract of purchase, but does not complete the purchase, and refuses to pay the purchase-money, and no conveyance executed, the vendors cannot recover from him the whole amount of the purchase-money, but only the damages actually sustained by his breach of contract.

In *assumpsit* by the vendor

against the purchasers of land, the declaration stated, that in consideration of the plaintiff's selling to the defendants certain land, *to be paid for as soon as the conveyance should be completed*, the defendants promised to purchase and pay for the same. Averment, that although the plaintiff had allowed the defendants to enter into possession of the lands, and had always been ready and willing to make a good title, and offered the defendants to execute a conveyance, and would have tendered a proper conveyance, but that the defendants discharged him from so doing; yet the defendants did not regard their said promise, and did not pay the plaintiff the purchase-money, or any part thereof. Plea, that no conveyance had ever been made or executed to the defendants:—*Held*, on general demurrer, that the plea was bad, and the declaration good.

Quære, whether the declaration would have been sufficient on special demurrer.

tiff says, that although the plaintiff, relying on the said promise of the defendants, did, within a short and reasonable time from the making of the said promise, to wit, on the day and year aforesaid, allow and permit the defendants to enter into and take possession of the said lot or parcel of land, and the defendants did, to wit, then, take such possession thereof, and have continued in such possession for a long time, to wit, hitherto: and although the plaintiff, from the time of making the said promise to the commencement of this suit, has performed and fulfilled every thing on his part to be performed and fulfilled, and has always been ready and willing to make appear to the defendants a good and sufficient title in, and right and power to convey, the said lot or parcel of land in fee-simple, together with the liberty aforesaid, and to execute and complete a conveyance thereof in fee-simple to the defendants, together with the liberty aforesaid; and after the expiration of a reasonable time, and before the commencement of this suit, to wit, on the 28th of October 1837, offered the defendants to execute and complete a conveyance thereof, together with the liberty aforesaid, to the defendants, and would then have tendered to the defendants a draft of a proper conveyance, and also a proper conveyance, for the purpose aforesaid, but that the defendants then discharged the plaintiff from so doing; of all which the defendants, from the time of making the said promise, have had notice: yet the defendants did not regard their said promise, and did not nor would pay the plaintiff the said purchase-money for the said lot or parcel of land, together with the said liberty, or any part thereof, at or after the expiration of the said reasonable time as aforesaid, or at any other time, but have wholly neglected and refused so to do; and the plaintiff has been and is wholly deprived of the said purchase-money, amounting to a large sum, to wit, £4125, together with interest thereon, to which he ought and otherwise would have been entitled as aforesaid.

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—There were also counts for use and occupation, goods sold and delivered, and upon an account stated.

The defendants pleaded non assumpserunt, and several special pleas, of which the sixth plea (to the first count) was, that no conveyance of the said lot or parcel of land, or any part thereof, has ever been made or executed or completed to them the defendants, or either of them, or to any person on their behalf, or in any manner whatsoever.—Verification.

The plaintiff took issue on all the pleas except the above, to which he demurred generally, and the defendants joined in demurrer. The point stated for argument by the plaintiff was as follows:—The plaintiff contends that the execution of a conveyance was not a condition precedent to his maintaining this action, and that if it were it has been waived, and that consequently the plea demurred to is bad.—The defendants' points were as follows:—The defendants will contend that the plea is a sufficient answer to the first count of the declaration; and they will also contend that the first count is insufficient, inasmuch as it shews no sufficient breach of the contract stated in that count; and also that the statement in the declaration, that the plaintiff offered to execute a conveyance, and would have tendered one, but that the defendants dispensed with it, is no sufficient ground for alleging as a breach that the defendants did not pay the purchase-money; and that upon the promise stated in the first count, the non-payment of the purchase-money is no breach of contract as alleged in that count; and that the breach alleged in the first count, and the claim to damages as therein stated, are not warranted by the premises or allegations in that count.

The cause came on for trial upon the issues in fact, before *Rolfe, B.*, at the last Liverpool assizes, when it appeared that the defendants (who were directors of a company called the Saw-Mills' and Timber Company, for which the purchase

was made) had been put into possession of the land under the agreement, and had taken therefrom and sold a quantity of brick clay. They subsequently refused altogether to complete the purchase, upon which the plaintiff brought this action, for the recovery of the purchase-money, and for the value of the clay so taken and sold. It was contended for the plaintiff at the trial, that the amount of the purchase-money agreed on, with interest, was the proper measure of damages on the first count. For the defendants it was insisted, that the plaintiff could not be entitled to recover the purchase-money, as the land had never been conveyed, and the plaintiff still remained the owner of it as before the agreement for sale to the defendants. The learned Judge was of opinion that the plaintiff could not recover the whole purchase-money, but was entitled, on the first count, to such damages only as had resulted from the defendants' breach of their contract: and a verdict was accordingly taken for the plaintiff for £750, made up as follows:—£680 for interest on the purchase-money up to the commencement of the action, and £70 for the value of the brick clay. In last Michaelmas Term (Nov. 3rd),

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Cresswell moved, pursuant to leave reserved by the learned Judge, for a rule to shew cause why the damages should not be increased by the sum of £4125, the amount of the purchase-money.—The plaintiff is entitled to recover the full amount of the purchase-money. This is a contract for a specific plot of land, to which the plaintiff has shewn a good title, and which he has offered to convey to the defendants in pursuance of the contract. He has a right to consider them as the owners, and to insist on payment of the price. Sir *E. Sugden* (a) appears to consider, that a vendor may recover the purchase-money without having executed a conveyance, where the purchaser has discharged

(a) 1 Vend. & P., 10th Ed. 374.

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him from so doing. [*Alderson*, B.—It is like the case of goods bargained and sold, and an action brought for not accepting them, in which case the damages sustained by the breach of contract can alone be recovered.] There the plaintiff treats the goods as still his own. [*Parke*, B.—So here, the land is still yours at law: you might bring ejectment for it immediately after this verdict.] In *Hawkins v. Kemp* (a), which was an action by the vendors of an estate against the vendee, who had refused to prepare any conveyance as required by the conditions of sale, or to pay the remainder of the purchase-money beyond the deposit, a verdict was given for the whole residue of the purchase-money. The defendants may afterwards go into equity to compel a conveyance.

PARKE, B.—The measure of damages, in an action of this nature, is the injury sustained by the plaintiff by reason of the defendants not having performed their contract. The question is, how much worse is the plaintiff by the diminution in the value of the land, or the loss of the purchase-money, in consequence of the non-performance of the contract? It is clear he cannot have the land and its value too. A party cannot recover the full value of a chattel, unless under circumstances which import that the property has passed to the defendant, as in the case of goods sold and delivered, where they have been absolutely parted with, and cannot be sold again. The direction of my Brother *Rolfe*, therefore, was quite correct.

ALDERSON, B., *GURNEY*, B., and *ROLFE*, B., concurred.

Rule refused.

The demurrer was now argued by

Cowling, for the plaintiff.—The execution of a convey-

(a) 3 East, 410.

ance is not a condition precedent to the plaintiff's recovering in this action, and if it were, it has been waived by the defendants. The plea is clearly bad. It states no more than is admitted on the face of the declaration; it amounts in effect only to a demurrer to the first count. But it will be argued that that count is bad. It is submitted, however, that although it may be somewhat more diffuse than was necessary, it is good. It states the contract—the possession taken by the defendants—the plaintiff's readiness to execute a conveyance—the expiration of a reasonable time—and that the plaintiff offered to execute a conveyance, and would have tendered a proper conveyance, but that the defendants discharged him from so doing. There is nothing to take this case out of the ordinary rule, that the purchaser is bound to prepare the conveyance; but nevertheless, the plaintiff *has* offered a conveyance here, but the defendants have dispensed with it. That condition precedent, if it be one, has therefore been waived. Then it is said the plaintiff is not entitled to recover the whole purchase-money; but the declaration does not seek to do so: the breach is only for the damages sustained by the non-performance of the contract. But even if the declaration were wrong in seeking to recover the whole purchase-money, that would be no bar to the action; but the defendants undertake by this plea to say something in bar of the whole action. [He was then stopped by the Court.]

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Wightman, for the defendants.—The first count of the declaration is bad. The breach alleged does not properly follow from the premises stated. The count alleges that, in consideration that the plaintiff, at the request of the defendants, would sell them a lot or parcel of land, &c. at the price of 7s. 6d. the square yard, *to be paid as soon as the conveyance thereof should be completed, &c.*, the defendants promised the plaintiff to purchase the land of

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him, and to pay him for the same at the rate or price and on the terms aforesaid: and the breach assigned is, that the defendants did not regard their promise, and did not nor would *pay the plaintiff the said purchase-money, &c.* There is no good breach, therefore, unless the defendants were bound under the circumstances to pay the purchase-money; if they were not it is a bad breach, and the plaintiff cannot recover in respect of it. The rule as to dependent covenants is thus laid down in the notes to the case of *Pordage v. Cole* (a):—"It is justly observed, that covenants &c., are to be construed to be dependent or independent of each other, according to the intention and meaning of the parties, and the good sense of the case; and technical words should give way to such intention." The following rules are then enunciated:—1. "If a day be appointed for payment of money or part of it, or for doing any other act, and the day *is* to happen, or *may* happen, *before* the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act, *before* performance; for it appears that the party relied upon his *remedy*, and did not intend to make the *performance* a condition precedent: and so it is where *no time* is fixed for performance of that which is the consideration of the money or other act." A vendor, therefore, may declare for non-payment of the purchase-money *on a certain day*, although no conveyance have been executed.—"But, 2. when a day is appointed for the payment of money, &c., and the day is to happen *after* the thing which is the consideration of the money &c. is to be performed, no action can be maintained for the money, &c., before performance." The present case falls within the latter rule. It does not appear here, that if the plaintiff were to recover the purchase-money, the defendants would have any remedy against him for the land; they only stipulate to pay as

(a) 1 Saund. 320 a., n. (4).

soon as the conveyance *shall be completed*. [Parke, B.— The conveyance and the payment are to be contemporaneous acts.] A tender of the conveyance is not sufficient; it must be executed *before* payment can be enforced. So, “if two men should agree, one that the other should have his horse, the other that he will pay £10 for him, no action lies for the money till the horse be delivered:” *Thorpe v. Thorpe* (a). [Parke, B., referred to *Knight v. Keech* (b).] It does not appear here that there were any mutual remedies, or, if there were, that the defendants intended to rely upon them: they stipulated to pay their money only when the purchase was completed; and although they may have subjected themselves to an action for damages, they are not liable to *this* action until after the execution of the conveyance. The plaintiff has therefore mistaken his remedy; he should have declared merely for damages for the non-completion of the contract, whereas here his only breach is the non-payment of the purchase-money, which, on this statement, he is not entitled to: *Warn v. Bickford* (c), *Phillips v. Fielding* (d).

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The Court then called on

Cowling to proceed with his argument.—In the first place, the count does not claim to recover the whole purchase-money. The breach, it is true, states that the defendants did not nor would pay the plaintiff the said purchase-money, *or any part thereof*, and that the plaintiff has been and is wholly deprived of it. But it would have been sufficient if it had alleged merely, that the defendants did not regard their said promise, and then concluded to the damage of the plaintiff, &c. The special damage alleged cannot be traversed or demurred to, and the plaintiff may

(a) 1 Salk. 171; Ld. Raym. 662.

(b) Skin. 344.

(c) 7 Price, 550.

(d) 2 H. Bl. 123.

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always recover for the damage properly alleged. Under that form of breach, the plaintiff might have recovered all that he has actually recovered in this action; and upon this demurrer, (the plea being to the whole count), the only question is, whether the plaintiff is entitled to recover anything. *Jones v. Barkley* (a) is an express authority for the plaintiff. There it was agreed that on the plaintiffs, who were assignees of a bankrupt, assigning the equity of redemption in certain Bank Stock to L., a mortgagee, and executing to him a general release, the defendant should, four months after the allowance of the bankrupt's certificate, pay a certain sum to the plaintiffs for the benefit of the creditors. The declaration stated, that the plaintiffs had at all times since the agreement been ready and willing, and at the expiration of the four months, viz. on &c., offered to assign the equity of redemption to L., and to execute a general release, and did then and there tender to the defendant a draft of such assignment and release to L., for the defendant's approbation, and did then and there offer to execute and deliver, and would have executed and delivered to the defendant, such assignment and release, but that the defendant then and there absolutely discharged the plaintiffs from executing the same, or any assignment or release whatever: and it was held, on demurrer, that the plaintiffs might maintain their action for the non-payment of the money by the defendant: on the ground, that where something is covenanted or agreed to be performed by each of two parties at the same time, he who was ready and offered to perform his part, but was discharged by the other, may maintain an action against the other for not performing his part. *Glazebrook v. Woodrow* (b), *Goodisson v. Nunn* (c), and *Martin v. Smith* (d), are authorities to the same effect. [*Parke, B.*—

(a) 2 Dougl. 684.

(b) 8 T. R. 366.

(c) 4 T. R. 761.

(d) 6 East, 555.

Your argument is, that nothing remains to be done which is beneficial to the plaintiff, but the payment of the money.] Yes; the plaintiff has perhaps even done more than was necessary. In *Glazebrook v. Woodrow, Le Blanc, J.*, says—"The payment is the consideration for the conveyance, and cannot be enforced till that be made, or at least offered to be made, by the plaintiff." Here more than that is shewn to have been done.

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Wightman.—Unless the defendants are bound to pay the purchase-money, no damages can be recovered for the non-payment of it: the plaintiff, therefore, must shew not only that the defendants did not pay, but also that they were bound to pay. The cases cited on the other side are distinguishable, and fall within the first rule cited from the note to *Pordage v. Cole*. In all of them, the conveyance was to be executed, and payment to be made, on a certain day; and when the plaintiff had done all that it was incumbent upon him to do on that day, the non-payment was a breach of contract on the part of the defendant. But here the time for payment has not yet arrived. [*Parke, B.*—In *Jones v. Barkley*, the payment depended on the previous act of assignment, as here of conveyance.] There was in that case a fixed day appointed: the defendant was not bound to pay until that day, although all the conditions precedent had been performed by the plaintiffs; but on the other hand, he was bound to pay on that day, unless he could shew good cause to the contrary. [*Lord Abinger, C.B.*—The day was material until the four months had elapsed, but not afterwards. *Parke, B.*—After the expiration of the four months, *Jones v. Barkley* became identical with the present case; the money was then to be paid simply on the execution of the assignment. Lord *Mansfield* says, "The question is, whether there was a sufficient performance. The party must shew he was ready; but if the other stops him on the ground of an intention

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not to perform his part, it is not necessary for the first to go farther, and do a nugatory act."'] But here the money is not to be paid until *after* the completion of the conveyance. True, it is by the defendants' default that it is not completed, and they may be liable in damages for that default; but not for non-payment of the money, until the time for payment of it has actually arrived. The case falls entirely within the rule laid down by Lord *Holt* in *Thorpe v. Thorpe*. Then as to the breach, it is clear that it must be taken to be contained in the express allegation that the defendants did not pay the purchase-money after a reasonable time. Suppose the Court held that, on this declaration, the plaintiff might recover the whole purchase-money; what counter-remedy have the defendants? Mutual promises are not even alleged. [Lord *Abinger*, C.B.—It is certainly informal; but does it not amount in substance to a complaint against the defendants for not completing the purchase?'] Assuming it to be so, still that does not entitle the plaintiffs to recover the purchase-money: but the non-completion of the purchase is not assigned as a breach, but is stated before the allegation of the breach.

LORD ABINGER, C.B.—I think that the breach is informally alleged, and that the words, "that the defendants did not regard their said promise," are not sufficient to constitute a good breach, so as to cure the defect; but the objection, as it arises on general demurrer, cannot prevail. With regard to the averment of the plaintiff's being ready and willing, and having offered, to execute a conveyance, the case of *Jones v. Barkley* appears to be an express authority, and must govern the present case. The averment is, that the plaintiff offered to execute a conveyance, and would have tendered a proper conveyance, but that the defendants discharged him from so doing. That, coupled with the other allegations in the declaration, is substantially the same as if it had been averred that the

defendants had refused to execute a conveyance actually tendered to them. Our judgment must therefore be for the plaintiff.

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PARKE, B.—I have had considerable doubt on this case in the course of the argument, but I have at length arrived at the same conclusion as that stated by my Lord. This declaration is certainly informally drawn, but I think it is sufficient on general demurrer, upon the principle laid down in *Jones v. Barkley*. Upon the facts alleged in this declaration, the plaintiff is substantially in the same situation, for the purpose of recovering the money, as if all had been done on his part which he engaged to do. It does not follow that he shall recover the whole purchase-money, but he is in the same situation for the purpose of recovering damages for the non-payment of the price, as if all had been done by him. The distinction which it has been attempted to draw between this case and *Jones v. Barkley*, is no distinction at all; it proceeds altogether on the ground, that there two contemporaneous acts were to be done on a particular day: but the case is just the same whether two contemporaneous acts are to be done at an indefinite time, or on a specified day. The only distinction is, that in that case one simple act was to be done by the plaintiffs, which the defendant discharged them from doing; here, what the plaintiff has to do is somewhat more complicated; first he is to make a good title, then the defendants are to prepare the conveyance, and the plaintiff to execute it; and the defendants having discharged him from doing that, it is the same as if it had been done. According to *Jones v. Barkley*, therefore, the plaintiff is in the same situation as if he had performed all his part of the agreement;—that is, as if he had perfected a conveyance. That is the conclusion to which I have at length arrived, and to which, perhaps, I should not have come but for the case of *Jones v. Barkley*. This is all on

Esch. of Pleas, 1841. general demurrer; had the question arisen on special demurrer, I doubt whether I should have come to the same conclusion.

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GURNEY, B. and ROLFE, B. concurred.

Judgment for the plaintiff (a).

(a) See *Poole v. Hill*, 6 M. & W. 835.

PALMER and Another v. GOODEN and Others.

Jan. 25.

Plea, to an action of covenant for rent due for turnpike-tolls, that before it became due, the trustees, on &c., entered into and upon a certain part of the tolls, and then ejected, expelled, put out, and removed the defendant from the possession thereof, and kept and continued him so ejected, &c. from thence hitherto. Replication, that the trustees did not enter into or upon the said part of the tolls, or eject, &c. the defendant from the possession thereof, modo et formâ:—*Held* bad on special demurrer, as putting in issue not only the expulsion, which was the only material allegation of the plea, but also the entry, which was immaterial.

COVENANT, by the trustees of the Honiton turnpike-road, for rent due for turnpike-tolls demised to the defendants, and payable by certain monthly payments. Breach, the non-payment of five such monthly payments. Second plea, as to the sum of &c., parcel &c.; *actionem non*, because before the said sum of &c. became due, and after the making of the said indenture, to wit, on &c., the said trustees in the said indenture and in the declaration mentioned, with force and arms &c., entered into and upon a certain part or portion of the said demised tolls, that is to say, &c. [setting out certain of the tolls], and then ejected, expelled, put out, and removed the defendant, Robert Gooden, from the possession thereof, and kept and continued him so ejected, expelled, put out, and removed, from thence hitherto.—Verification. There was also a third plea, differing from the second only in stating that the tolls from which the defendant was evicted, were certain tolls on lime used for agricultural purposes.

Replication, that the said trustees did not enter into or upon the said part or portion of the said demised tolls, or eject, expel, put out, or remove the defendant, Robert Gooden, from the possession thereof, modo et formâ.

Special demurrer, assigning for cause, that the replication puts in issue the entry, which is an immaterial fact, as well as the expulsion, which is the only material fact

alleged in the plea ; that it puts in issue two facts, whereas it ought to put in issue one only, &c.

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Cowling, in support of the demurrer.—The replication is bad. The traverse ought to have been confined to the substantial allegation of the plea, namely, the eviction, whereas it comprehends also the immaterial fact of the entry: *Hodgskin v. Queenborough*(a), *Bushell v. Lechmore*(b). There may be an eviction without an entry, and the former is the only material part of the plea. In *Vin. Abr. Disseisin* (C. 5), it is said,—“If a man hath a house, and locks it and departs, and another comes to his house and takes the key of the door into his hand, and says that he claims the house to himself in fee, without any entry into the house, this is a disseisin of the house.” And again, (*Id.* (C. 7).)—“If a man that has a right to enter into lands, in coming towards the land is disturbed from entering, this is a disseisin.” [*Parke*, B.—I do not know how an entry could be made on tolls.] How then can the defendants prove the issue cast upon them by the replication? The averment of entry is a mere inference of law, like that of the entry of a tenant, alleged in covenant or debt for rent, and cannot be traversed. The case resembles that of the traverse of a particular day, where time is not material: *Hawe v. Planner* (c).

• *Crowder*, contra.—The replication does in fact take issue on the only point which was traversable. The entry being wholly immaterial, and indeed impossible, the denial of it does not throw any onus of proof on the defendants; and it is in effect a denial of the eviction only. The cases referred to on the other side only prove that an issue on the eviction only would have been good: but the eviction includes an entry. The averments of payment by the

(a) *Willes*, 129.

(b) *Lord Raym.* 369.

(c) 1 *Saund.* 13.

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defendant, and acceptance in satisfaction by the plaintiff, may be included in one traverse: *Webb v. Weatherby* (a). [Parke, B.—There must have been an acceptance in satisfaction, to constitute a payment in satisfaction: the one proposition is involved in the other.] So here, the eviction involves an entry.

PER CURIAM.—The plaintiffs have included immaterial matter in their traverse, which they ought not to have done. The replication is contrary to the usual forms of pleading. You had better amend.

Leave to the plaintiffs to amend on payment of costs; otherwise

Judgment for the defendants (b).

(a) 1 Bing. N. C. 502; 1 Scott, 477. the defendants, which, however, has since been reversed on error in

(b) The plaintiffs declined to amend, and there was judgment for the Exchequer Chamber. See post, vol. 8.

WATKINS v. WAKE.

Jan. 25.
Debt is maintainable on a bill of exchange by indorsee against his immediate indorser.

DEBT upon a bill of exchange for £40, by indorsee against his immediate indorser. General demurrer, and joinder.

G. T. White, in support of the demurrer.—Debt is not maintainable against the indorser of a bill of exchange: the only remedy is by assumpsit. The promise of an indorser is not an absolute undertaking to pay the bill, but is in the nature of a collateral engagement only, to pay if the acceptor makes default. And *Randall v. Rigby* (a) is an authority to shew that debt cannot be maintained on a collateral covenant. No case has yet decided that debt is maintainable by an indorsee against an indorser of a bill of exchange. In *Bishop v. Young* (b), it was held that debt

(a) 4 M. & W. 130.

(b) 2 Bos. & P. 78.

would lie by the *payee* against the *maker* of a promissory note; and it appeared also, by the declaration, that the note was expressed to be made for value received. So, in *Priddy v. Henbrey* (a), the action was by the *drawer* against the *acceptor* of a bill, and it was shewn to have been given for value received in goods. In *Hatch v. Traves* (b), also, the action was by payee against maker of a note; and in *Watson v. Kightley* (c), by drawer against acceptor of a bill. In all these cases, the party sued was primarily liable. But debt will not lie by the indorsee against the acceptor of a bill: *Cloves v. Williams* (d). Here the defendant is described and sued, not as a drawer, but as an indorser.

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Peacock, contra. — Debt will lie on a bill or note, wherever there is a privity of contract between the parties: *Bishop v. Young*, *Priddy v. Henbrey*. Therefore, on a bill payable to the order of the drawer, debt is maintainable at the suit of the first indorsee against the drawer: *Stratton v. Hill* (e). That case is expressly in point, because every indorser is in law a new drawer. The action cannot, indeed, be maintained by an indorsee against the acceptor, or against a prior indorser; because, in such case, there is no debt between the parties. But the contract of an indorser with the party to whom he indorses, is not a conditional engagement to pay the acceptor's debt, but a direct contract to pay *his own* debt, if the acceptor do not pay for him. Any party may sue in debt the party to the bill immediately before himself, who is therefore his debtor on the bill, and against whom the bill would be evidence of an original debt due from him to the party suing, to sustain an indebitatus count.

White, in reply. — The privity of contract, which is sufficient to enable a party to sue in debt, means a privity

(a) 1 B. & Cr. 674; 3 D. & R. 165.

(b) 3 P. & D. 408.

(c) *Ibid.*

(d) 3 Bing. N. C. 868; 5 Scott, 68.

(e) 3 Price, 253; 2 Chit. 126.

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independent of any security, and that is the ground upon which, according to the judgment of *Bayley, B.*, in *Priddy v. Henbrey*, the decision in *Bishop v. Young* proceeded. Where the defendant is drawer as well as indorser, he may be liable in debt, because the indorsement does not alter his original liability. But the engagement of the indorser is a merely collateral one, on the default of the acceptor, to take upon himself his debt.

LORD ABINGER, C. B.—The case of *Stratton v. Hill* is a sufficient authority to shew, that where the bill has been transferred immediately from the defendant to the plaintiff, debt will lie; and the point having been once determined, I see no reason why we should depart from that decision. The promise of the drawer, as well as of the indorser, is a conditional one to pay on the acceptor's making default; yet that case recognizes the principle that debt lies by the payee against the drawer, and the same principle applies here.

PARKE, B.—I have also no doubt that debt is maintainable in this case, by reason of the privity between the parties. The case of *Stratton v. Hill* is a precise authority in favour of the plaintiff; that case is thus explained in the judgment of the Court in *Priddy v. Henbrey*:—"The only ground upon which that decision could properly have proceeded was this, that between the immediate indorser and his indorsee there was privity. The indorsement implied that the indorser was debtor pro tanto to the indorsee, and that the indorsement was a contract by the indorser that that debt should be duly paid." The act of indorsement is an admission of a debt due from the indorser to his indorsee, and also implies a conditional promise to pay that debt if the acceptor do not, and upon having due notice of the dishonour of the bill. On those events occurring, it becomes an absolute debt payable on request. The law

is so laid down in *Stratton v. Hill*, and I think that is a just and sound principle.

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ALDERSON, B.—I am of the same opinion. The circumstances stated in this declaration shew, that, as between these parties, there is a debt of £40.

Judgment for the plaintiff.

CHRISTIE v. PEART.

ASSUMPSIT by the plaintiff, as manager of the Eastern Bank of Scotland, against the defendant as acceptor of a bill of exchange, drawn by J. H. L., and indorsed by him to the Banking Company. The declaration commenced thus:—"William Christie, the manager of a certain joint-stock company or copartnership, the shares whereof are transferable, established in Scotland for the purpose of banking, under the name and description of the Eastern Bank of Scotland, which said William Christie hath been duly named and appointed as the nominal plaintiff for and on behalf of the said copartnership, under and according to the provisions of a certain act of Parliament made and passed in the 7 Geo. 4, intituled &c., complains" &c.: and after alleging the acceptance, indorsement, &c.. of the bill, the declaration stated, that the bill was not paid, although duly presented on the day when it became due, and that the defendant "afterwards, to wit, on the day and year last aforesaid, promised the said copartnership to pay them the amount of the said bill, according to the tenor and effect of his said acceptance thereof."

Jan. 25.

In an action brought by the public officer of a joint-stock banking copartnership, established under the 7 Geo. 4, c. 46, it is sufficient to state in the declaration, that the plaintiff is the manager of a certain joint-stock copartnership established for the purpose of banking, and that he has been duly named and appointed as the nominal plaintiff on behalf of the copartnership, under the provisions of the statute, without stating expressly that he has been named as manager, or that the copartnership has

been established, under the provisions of the act.

In assumpsit by the indorsee against the acceptor of a bill of exchange, the declaration, after stating that the bill was not paid, although duly presented on the day when it became due, alleged that the defendant *afterwards*, to wit, on the day and year last aforesaid, promised the plaintiff to pay him the said bill according to the tenor and effect of his said acceptance:—*Held* sufficient on special demurrer, as amounting, after the bill became due, to a promise to pay on request.

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Special demurrer, on the grounds,—1st, that it was not alleged in the declaration that the plaintiff was named manager in pursuance of the act of Parliament, or that the society was established in Scotland under the provisions of the act; and 2ndly, that the promise alleged in the declaration was insensible and repugnant, and would not by law be inferred, inasmuch as it was a promise which it would be impossible to perform, if made, as alleged, after the bill was due.

Bayley, in support of the demurrer, having mentioned the first point, the Court referred to *Spiller v. Johnson* (a) as an authority against him. On the second, he urged that the promise was improperly stated; it ought to have been alleged as a promise by the defendant to pay the bill when he should be thereunto afterwards requested. *Donaldson v. Thompson* (b) appeared to be an authority against the defendant, but that was an action against the maker of a promissory note, which, on the face of it, imports a promise to pay.

PER CURIAM.—After the dishonour of a bill, it is payable on request; a promise, therefore, by the acceptor, after the bill is due, to pay it according to the tenor and effect of his acceptance, is a promise to pay it on request. The effect of the acceptance is, after dishonour, to make the bill payable on request.

Judgment for the plaintiff.

(a) 6 M. & W. 570.

(b) Id. 316.

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MARY ANN JONES, Administratrix of Richard Jones,
deceased, v. JOHN WILLIAMS.

Jan. 26.

ASSUMPSIT.—The first count of the declaration stated, that heretofore, to wit, on &c., in consideration that the said Richard Jones, in his lifetime, at the request of the defendant, would, by his writing obligatory sealed with his seal, acknowledge himself to be firmly bound to one William Jones in the penal sum of £600, to be paid to the said William Jones, or his certain attorney, executors, administrators, or assigns, he, the defendant, undertook and faithfully promised that he would save harmless and indemnify the said Richard Jones, his executors and administrators, from any loss or damage by reason of his making and executing the said writing obligatory. And the plaintiff in fact saith, that the said Richard Jones, confiding in the said promise of the defendant, did afterwards, to wit, on &c., seal, and as his act and deed deliver to the said William Jones a certain writing obligatory, the date whereof is a certain day, to wit, &c., and did thereby and therein acknowledge himself to be bound to the said William

A declaration in assumpsit stated, that in consideration that R. J. in his lifetime (of whom the plaintiff was administratrix) would execute a bond to W. J. in the penal sum of £600, the defendant undertook that he would save harmless and indemnify R. J., his executors and administrators, from any loss or damage by reason of his executing the bond: the declaration then averred the execution of the bond by R. J., his death, and the grant of administra-

tion to the plaintiff, and that the plaintiff, as administratrix, became liable to pay and satisfy the bond to W. J., of which the defendant had notice; but that the defendant did not indemnify the plaintiff, as such administratrix, from loss or damage by reason of the execution of the bond; by means whereof the plaintiff, as administratrix, was called upon, and forced and obliged, to pay, and did pay to W. J. the sum of £310, secured by the bond, and a further sum for the costs of an action against her, &c. Plea, that the plaintiff, as administratrix, was not called upon, or forced or obliged, to pay, nor did she pay to W. J. the monies in the declaration mentioned, nor was she damaged as therein mentioned, in manner and form, &c. The bond, when produced on the trial, appeared to be subject to a condition for repayment of the sum secured, with interest, "at or before the expiration of six months' notice to be given to pay the same:" and there was no proof of such notice having been given. It appeared, however, that the defendant had notice of the action being commenced against the plaintiff on the bond (which was stayed by a Judge's order on payment of debt and costs), and did not come in to defend it:—*Held*, that this was sufficient to entitle the plaintiff to recover on the above issue.

The defendant's undertaking was contained in two letters, addressed to C. J., the brother of the plaintiff's intestate R. J., in the first of which he pressed C. J. to join, and to induce his brothers to join, in a security for the repayment of money to be advanced to the defendant for carrying on a suit in Chancery; and in the second he again urged that they should lend their names for this purpose, and added,—“I should consider it a matter of favour to myself if your brothers will join, and I will see that they come to no harm.” R. J., in consequence, executed the bond in question:—*Held*, that the letters amounted to an *actual guarantee*, on which the defendant was liable to the plaintiff, and not merely to a representation, with a view to the parties doing an act against the consequences of which they should afterwards be protected.

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Jones in the penal sum of £600, to be paid to the said William Jones, his executors, administrators, or assigns: and afterwards, to wit, on the 21st day of April, 1839, the said Richard Jones died; after whose death, to wit, on the 10th of May, in the year last aforesaid, administration of and singular the goods, chattels, rights, and credits of the said Richard Jones, deceased, at the time of his death, who died intestate, in due form of law was granted to the plaintiff; and the plaintiff, as administratrix as aforesaid, became liable to pay and satisfy the said writing obligatory to the said William Jones; of which the defendant then, to wit, on &c., had notice: Yet the defendant, not regarding his said promise, did not nor would indemnify or save harmless the plaintiff, as such administratrix, from loss and damage by reason of the making and executing of the said writing obligatory, but wholly neglected and refused so to do; by means and in consequence whereof the plaintiff, as administratrix as aforesaid, afterwards, to wit, on &c., was called upon, and forced and obliged, to pay, and did then pay to the said William Jones, a large sum of money, to wit, the sum of £310, payable and secured to the said William Jones by the said writing obligatory, and also a further large sum, to wit, the sum of £10, as and for the costs and expenses of a certain action commenced and prosecuted by the said William Jones against the plaintiff, as administratrix as aforesaid, in her Majesty's Court of Exchequer, &c., upon and in respect of the said writing obligatory, and for enforcing payment of the money secured thereby; and also she the plaintiff, as administratrix as aforesaid, by means of the premises, was forced and obliged to incur, and did incur, certain costs, charges, and expenses, amounting in the whole to a large sum of money, to wit, the sum of £40, in and about the defence of the said action, and in and about the settling and putting an end to the said action; and the plaintiff, as administratrix as aforesaid,

hath been and is damnified to the amount thereof.—There was also a count on account stated with the plaintiff as administratrix.

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Pleas, first, non assumpsit; secondly, (to the first count) that the plaintiff, as administratrix as aforesaid, was not called upon, or forced or obliged to pay, nor did she pay, to the said William Jones, the said monies in the said first count in that behalf mentioned, nor was the plaintiff, as administratrix as aforesaid, damnified as in the said first count mentioned, in manner and form, &c.; on which issues were joined.

At the trial before Lord *Denman*, C. J., at the last Montgomeryshire Assizes, the following letters from the defendant to Charles Jones, a brother of the intestate, were put in to shew the contract of indemnity. They were without date, but were shewn to have been received prior to the advance of the money by William Jones, and to the execution of the bond.

“Llanwchllyn.

“My dear Sir,—I don’t know whether I mentioned to you the result of this business (I mean the £200) after your return from Manchester; I sent the bill of the ‘Old People’ (a) to my brother David, to get him to send it to Hyde (who is his regular agent), which he did; but Hyde declined taking it; I therefore promised to obtain the money before the 1st of June for him, otherwise he would have declined to carry on the suit. I have now had a promise of the money, provided you and your brother will join the ‘Old People’ in the security, to which I hope neither of you will have any objections, as it is not likely that you will ever be called upon to pay the money; for in the event of our succeeding, of which there cannot be a doubt, we shall soon get the money back, and the cause will be now heard in less than a month, if we can muster the funds;

(a) A dissenting congregation, who had engaged in a suit in Chancery, to carry on which the money was wanted.

Arch. of Pleas, otherwise it must of necessity be given up, which would
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 WILLIAMS. be a great pity, after fighting victoriously thus far. You and I are already in, and I fancy your brothers would not object, under the circumstances, to do the like. May I beg the favour of you to speak to them? as I must determine one way or the other to-day, whether this money will be taken or not, which will only be advanced on you and your brothers joining; and the fate of this well-fought cause now depends upon it.

“Yours faithfully,

“J. WILLIAMS.

“To C. Jones, Esq. Vownog, Monday Morning.”

“My dear Sir,—It is a great pity, after spending so much money, and bringing the cause almost to a conclusion, that it should be abandoned, with a certainty of losing the costs already incurred, and the shame of retreating under such circumstances. I only ask your brothers to lend their names on this emergency. I will engage that the ‘Old People’ or the chapel shall make up the money if occasion requires, but I have no doubt I shall procure it from our opponents; however, I should consider it a matter of favour to myself if your brothers will join, *and I will see that they come to no harm by it.*”

“Yours faithfully,

“J. WILLIAMS.

“To C. Jones, Esq. Vownog, Monday.”

It was proved that, on the faith of this engagement, the sum of £300 was advanced by William Jones to the defendant, for securing which the bond in question was given to William Jones by the intestate and his two brothers, Charles and Robert Jones. The bond, being put in, appeared to be subject to a condition for repayment by the obligors of the sum secured, with interest, “at or before the expiration of six months’ notice to be given to

them to pay the same, without deduction, and without fraud or further delay." The proceedings in the action brought by William Jones against the plaintiff upon the bond were also put in, and it appeared that it was terminated, after declaration, by the proceedings being stayed on payment of the debt and costs under a Judge's order. It was not proved that six months' notice of payment was given to the plaintiff, according to the condition of the bond; but it appeared that the defendant had notice of the action against her, and of the proceedings therein.

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On behalf of the defendant, it was objected, first, that the undertaking of the defendant was a promise to answer for the debt or default of another, within the 4th section of the Statute of Frauds, and that no sufficient consideration appeared upon the face of it; secondly, that there was no privity of contract between the defendant and the intestate, Richard Jones, on which the plaintiff could sue, the letters being addressed, and the undertaking in terms given, to Charles Jones personally; thirdly, that the letters did not constitute a guarantee, but merely amounted to a proposal to enter into an engagement in future; and lastly, that, it not having been proved that the six months' notice to pay the money secured by the bond, to which by the condition the obligors were entitled, had been given, the allegation in the declaration, that the plaintiff "was called upon, and forced and obliged to pay," which was traversed by the second plea, was not sustained. The Lord Chief Justice overruled all the objections except the last; but, being of opinion that the notice ought to have been proved, on that ground nonsuited the plaintiff, with leave to move to set aside the nonsuit, and enter a verdict for the sum of 32*l.* 17*s.*, the amount of principal, interest, and costs, if the Court should think that proof of the notice was unnecessary.

In Michaelmas Term, *Welsby* obtained a rule nisi accordingly, contending, first, that the allegation of the

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plaintiff's *liability* on the bond was admitted by the plea, which put in issue only the fact of the payment; and secondly, that if not, yet, as against the defendant, the bringing of the action was sufficient *prima facie* evidence of notice.—Against this rule

Jervis, Cowling, and W. Yardley now shewed cause.—The nonsuit was right. Notice not having been proved to be given according to the condition of the bond, there was no evidence to sustain the allegation in the declaration, that the plaintiff was *called upon*, and forced and obliged to pay. It is said that the plea admits the allegation in the declaration, that the plaintiff, as administratrix, became *liable* to pay the amount secured by the bond, and puts in issue only the fact of the payment being enforced against her. But the only allegation of liability is that the plaintiff became liable *as administratrix*, by the grant of the letters of administration, in the same way as her intestate; and the question, whether she was duly called upon for payment by a proper notice, and so forced and obliged to pay, remains open on the plea. Now this is not a common money bond, but is subject to a special condition, that the obligors shall repay the amount “at or before the expiration of six months’ notice to be given to them to pay the same.” That implies that such notice shall be given before putting the bond in suit. Suppose the plaintiff had set out the bond in the declaration; she must have averred that notice was given pursuant to the condition: *Batson v. Spearman* (a). It is like the case of an action on a bill of exchange against the drawer, in which regular notice of dishonour, through all the parties, must be proved: *Marsh v. Maxwell* (b). [Lord Abinger, C. B.—There the want of notice discharges the party altogether from the debt: here it comes only to a question of time.

(a) 9 Ad. & E. 298; 3 Per. & D. 77.

(b) 2 Camp. 210, n.

Alderson, B.—The money is to be paid at or before the expiration of six months' notice. Suppose, this action having been defeated for want of notice, another were brought—would not that be evidence of notice?] The condition refers to a notice in the ordinary sense of the word, and assumes that a *prior* notice shall be given before bringing an action. In Sheppard's Touchstone, 390, it is said,—“ If the obligee be sued unjustly, either because he is sued before the money is due, or otherwise, or if the bond in which he is bound be against law, and void, and he suffer himself to be unjustly vexed thereupon, and doth not take advantage of it, it seems this is no breach of the condition of the bond to save harmless.”

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But secondly, these letters do not constitute a *guarantee* sufficient to bind the defendant. They amount to no more than a proposal, that, on the doing of some future act, the defendant will enter into a contract of indemnity. Further, there is no contract with the intestate, but only with Charles Jones, to whom the letters are addressed. It is merely a representation to him, with a view that he and his brothers should do something, against the consequences of which they should afterwards be protected.

Alexander, Welsby, and Tomlinson, *contra*, were stopped by the Court.

Lord ABINGER, C.B.—I think there is no ground on which the nonsuit can be sustained. The first objection made at the trial, as to the form of the guarantee, arises on the general issue. We must interpret the two letters together, and read them as if they constituted one document; and when so interpreted, I think it is clear that they disclose an actual binding guarantee. The general issue, therefore, is not sustained. Then as to the second plea: suppose the record had set out the condition of the bond, and the plea had alleged the want of the six months'

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notice before the bringing of an action : if the fact were so, it could only have protected the defendant from the costs of the former action, because the bringing of the action would itself be notice, and if the plaintiff paid afterwards, that would be a payment after notice. That is the utmost benefit the defendant could have derived from such a plea. I think, however, that it was not necessary for the plaintiff to prove more than was proved in this case. The defendant had notice of the action, and might have come in and defended it, if there was a good defence by reason of the want of notice. The second issue ought, therefore, to have been found for the plaintiff; and consequently the nonsuit must be set aside.

PARKE, B.—I agree that this rule must be made absolute to enter a verdict for the plaintiff. If the nonsuit could have been sustained on any of the grounds taken at the trial, or if the jury ought to have been directed on either of the issues in favour of the defendant, then, no doubt, the rule ought to be discharged. The ground on which the nonsuit proceeded was, that it was necessary for the plaintiff, on the second issue, to prove notice given to her according to the condition of the bond. I think there was sufficient evidence to shew that she was bound to pay according to the terms of the bond. The condition is, that the obligors shall pay the amount secured “at or before the expiration of six months’ notice to be given to them to pay the same.” Supposing no notice to have been given, the question is, whether the defendant might not have paid, in order to save the penalty, before notice. I do not rely on the ground taken on moving for this rule, that the liability of the plaintiff is admitted on the record, because I am disposed to think that the averment of her liability, in the declaration, is only as a consequence of the character in which she sues, as administratrix : but I think there was sufficient evidence to shew that the defendant

was bound to pay. It was proved that the defendant had notice of the action upon the bond, and he ought to have undertaken the defence. The case is within the authority of *Duffield v. Scott* (a), where *Buller, J.*, says,—“The purpose of giving notice is not in order to give a ground of action; but if a demand be made, which the person indemnifying is bound to pay, and notice be given to him, and he refuse to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying that the defendant in the first action was not bound to pay the money.” On that ground, I am of opinion that sufficient evidence was given that the defendant was bound to pay, having had notice of the action, and having made no defence to it.

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As to the other objection, I quite agree that the letters amount to an absolute guarantee to save the intestate harmless from a security, the nature of which may be explained by parol evidence. There was, therefore, evidence for the plaintiff on both issues. Then *Duffield v. Scott* shews that she is entitled to recover the whole amount.

ALDERSON, B., and GURNEY, B., concurred.

Rule absolute accordingly (b).

(a) 3 T. R. 374.

(b) See *Huntley v. Sanderson*, 1 C. & M. 467.

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COCKER v. TEMPEST.

Jan. 19.

Where a Judge's order for staying proceedings in an action brought against good faith, was made in Trinity Vacation, and a motion to set aside that order was not made until Michaelmas Term:—*Held*, that the mere lapse of time was not sufficient to preclude the application, no injury having accrued to the defendant thereby.

Every Court has an unlimited power over its own process, and may stay proceedings brought against good faith, though the agreement, in fraud of which the action was brought, was made whilst the parties were not under the authority of the Court.

TRESPASS for false imprisonment, against the late sheriff of Yorkshire. It appeared from the affidavits, that, on the 16th of May, 1840, the plaintiff had been taken in execution on a ca. sa., and whilst imprisoned in York Castle, an order for his discharge, purporting to come from the execution creditor, had been sent to the sheriff. It was afterwards suggested that this order was forged, and the sheriff again took the plaintiff into custody. The plaintiff's wife then applied to the sheriff for his discharge, and was told that the plaintiff would be discharged upon signing a paper, which turned out to be an undertaking not to bring any action against the sheriff. The plaintiff signed the paper, and on the 26th of June, 1840, commenced the present action for false imprisonment. Application was made to *Parke*, B., in Trinity Vacation, to stay the proceedings; and he made an order accordingly.

W. H. Watson, on the last day of Michaelmas Term, obtained a rule nisi to rescind this order; against which

Cresswell and *Humfrey* now shewed cause.—First, the application is too late. Nothing is shewn by the affidavits to account for the delay in not applying to the Court until the last day of the term subsequent to the order. [*Parke*, B.—That is a mere lapse of time, and not a delay by the parties with a view to benefit themselves; and no injury having accrued to the defendant, we do not see anything to preclude the plaintiff from making the application. *Alderson*, B.—Lapse of time may, under some circumstances, preclude a party from applying to the Court, but those circumstances do not exist in the present case.]—As to the other point, there can be no doubt of the power of the Court to stay proceedings, when the justice of the

case requires it. It is the constant practice to do so where a second action is brought before the costs of a former suit are paid. It was so done in *Weston v. Withers* (a), *Moulton v. Bingham* (b), *Baldwin v. Richards* (c). [*Alderson*, B.—The consolidation rule depends upon the same principle, and also the practice of the Courts, before the late act, as to issuing commissions for examining witnesses. The only doubt appears to be, where the agreement is entered into whilst the parties are not under the authority of the Court.] The only difference in that case is, that the Court requires to see that the agreement was reasonable.

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W. H. Watson, in support of the rule.—The Court has no jurisdiction to stay proceedings, except in cases where the agreement is made under the authority of the Court. Where the parties are before the Court, it may impose upon them such terms, as to giving security and paying costs, as shall seem reasonable; but there is no power to exclude suitors from the Court. If indeed such power existed, it would be in most cases unnecessary to apply to the Court of Chancery for an injunction. According to the argument on the other side, every inferior Court might exercise the same power.

PARKE, B.—There can be no doubt that the Court has power to stay an action which is brought against good faith, but the power is one which requires great discretion in the exercise of it.

ALDERSON, B.—The power of each Court over its own process is unlimited; it is a power incident to all Courts, inferior as well as superior; were it not so, the Court would be obliged to sit still and see its own process abused

(a) 2 T. R. 511.

(b) *Ibid.* n.

(c) *Ibid.* n.

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for the purpose of injustice. The exercise of the power is certainly a matter for the most careful discretion ; and where there are conflicting statements of facts, I agree that it is in general much better not to try the question between the parties on affidavit. The power must be used equitably ; but if it be made out that the process of the Court is used against good faith, the Court ought to interfere to prevent it, for the purpose of administering justice. The distinction between this power and that which is exercised by a Court of Equity in granting an injunction, is, that the injunction stops proceedings in another Court, this only in the Court in which the proceedings are.

GURNEY, B., and ROLFE, B., concurred.

The rule was ultimately discharged on the merits.

TURQUAND and Others, Assignees of B. & S. VANDERPLANK,
v. MOSEDON.

Jan. 27.

In trover by the assignees of a bankrupt, the defendant pleaded, that, before the bankruptcy, he advanced the bankrupt a sum of money upon the deposit of the goods in respect of which the action was brought. Replication, that it was corruptly, and against the form of the statute, &c. agreed between the defendant and the bankrupt, that the latter should pay the defendant for the loan of the money £10 per cent :—*Held*, on special demurrer, that the averment of the contract being against the form of the statute was not a sufficient allegation that it was illegal ; and that the replication was bad, for not alleging either that the contract was made before the 7 Will. 4 & 1 Vict. c. 80, and 2 & 3 Vict. c. 37, came into operation, or that it was excepted from the provisions of those acts.

TROVER by the assignees of a bankrupt. The defendant pleaded, as to parcel of the goods in the declaration mentioned, that, before the said B. Vanderplank and S. Vanderplank became bankrupts, to wit, on &c., they requested the defendant to lend and advance to them the sum of £150, and then offered to the defendant, as a security for the repayment of the said sum to be so lent and advanced, and interest thereon, to deposit with the said defendant certain goods and chattels, to wit, ninety-six ends of grey cloths, and that the defendant should hold and retain the same until the said sum of £150, so to be lent and advanced, and interest thereon, should be repaid

and satisfied; and thereupon, before the said B. Vanderplank and S. Vanderplank became bankrupts, the defendant then contracted and agreed with the said B. Vanderplank and S. Vanderplank to make such loan and advance of £150, upon having the last-mentioned goods and chattels so deposited with the said defendant, as such security for the repayment thereof, and upon the terms that he might hold the said last-mentioned goods and chattels as such security for the repayment of such loan; and the said B. Vanderplank and S. Vanderplank then contracted and agreed with the defendant to borrow of him the defendant the said sum of £150, and to make the said deposit, and permit the defendant to hold the said last-mentioned goods and chattels, as such security as aforesaid for the repayment of the said loan and advance: that the said contract and agreement being so made as aforesaid, afterwards, and before the said B. Vanderplank and S. Vanderplank became bankrupts, the defendant did accordingly, and in pursuance of the said contract and agreement, at the request of the said B. Vanderplank and S. Vanderplank, lend and advance to them the sum of £150; and in consideration thereof, the said B. Vanderplank and S. Vanderplank did then, and before they became bankrupts, in pursuance of the said contract and agreement, deposit with the defendant the said ninety-six ends of grey cloth, for the purpose and under and upon the terms of the said contract and agreement: and thereupon, on the occasion aforesaid, and before the said B. Vanderplank and S. Vanderplank became bankrupts, the said B. Vanderplank and S. Vanderplank then further contracted and agreed with the said defendant, that he should be at liberty to keep absolutely the said last-mentioned goods and chattels, at 2s. 8d. per yard, if decided on by the defendant in one month from the date of the said last-mentioned agreement; and that if the said last-mentioned goods and chattels should not be kept so absolutely

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by the defendant, they the said B. Vanderplank and S. Vanderplank further contracted and agreed to give the defendant interest on the said sum of £150 so lent and advanced as aforesaid, at and after a certain rate then agreed upon between the said defendant and the said B. Vanderplank and S. Vanderplank; and that if the said last-mentioned goods and chattels should be kept so absolutely by the defendant, then that no interest was to be charged: That afterwards, and before the said B. Vanderplank and S. Vanderplank became bankrupts, and whilst they were so possessed of the goods and chattels in the introductory part of this plea mentioned, parcel &c., and before the expiration of one month from the date of the last-mentioned contract and agreement, and before the said defendant had decided to keep the said ninety-six ends of grey cloth, at the rate aforesaid, and whilst the same ends of grey cloth were so in the possession of the said defendant, for the purpose, and under and upon the terms of the said contracts and agreements, it was further contracted and agreed by and between the said defendant and the said B. Vanderplank and S. Vanderplank, and at the request of the said B. Vanderplank and S. Vanderplank, that the said defendant should return and re-deliver to the said B. Vanderplank and S. Vanderplank the said ninety-six ends of grey cloth so deposited with the said defendant as aforesaid; and that, in consideration of such return and re-delivery to the said B. Vanderplank and S. Vanderplank, they the said B. Vanderplank and S. Vanderplank should deposit with the said defendant, in exchange for the said ninety-six ends of grey cloth, and in lieu and instead thereof, certain other goods and chattels, to wit, the goods and chattels in the introductory part of this plea mentioned, parcel &c., and that the said defendant should receive, have, hold, and detain the said last-mentioned goods and chattels, parcel &c., in such exchange, lieu, and stead of the said ninety-six ends of grey cloth, for the

purpose and under and upon the terms of the said first-mentioned contracts and agreements. The plea then averred that the defendant returned the ninety-six ends of grey cloth, &c., and that the said B. Vanderplank and S. Vanderplank deposited with him, in lieu thereof, the goods and chattels in the introductory part of the plea mentioned; that the defendant had not decided upon keeping the same, and that the £150 and interest remained unpaid, wherefore the defendant detained the goods, as he lawfully might.

Replication, that, before the lending and advancing of the money in that plea mentioned by the defendant to the said B. Vanderplank and S. Vanderplank, it was corruptly, and against the form of the statute in such case made and provided, agreed by and between the defendant and the said B. Vanderplank and S. Vanderplank, that the said B. Vanderplank and S. Vanderplank should pay to the defendant, for such time as the defendant should forbear and give day of payment of the sum of money in the said plea mentioned, a certain sum of money, to wit, at and after the rate of £10 per cent. per annum: and that the said sum or rate so agreed to be given and paid by the said B. Vanderplank and S. Vanderplank to the defendant, for such loan and forbearance as aforesaid, exceeds the rate of £5 for the forbearance of £100 for a year, contrary to the form of the statute in such case made and provided. Verification.

Special demurrer, assigning for causes, that although the plaintiffs, by their replication, have confessed the making of the several contracts in the plea mentioned, and the lending and advancing of the money by the said defendant to the said B. Vanderplank and S. Vanderplank, and the deposit of the said goods and chattels by the said B. Vanderplank and S. Vanderplank with the defendant, under and upon the terms of the said contracts, yet the plaintiffs have, in and by their said replication, stated and

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insisted on, by way of answer and avoidance, matters which, if true, since the passing of a certain act of Parliament made and passed in the 2nd & 3rd years of the reign of her Majesty Queen Victoria, intituled "An act to amend and extend, until the first day of June, 1842, the provisions of an act of the first year of her present Majesty, for exempting certain bills of exchange and promissory notes from the operation of the laws relating to usury," have been and are wholly inoperative and insufficient as an avoidance and answer to the said matters in the said plea alleged. And also that if the plaintiffs had intended to insist that the said B. Vanderplank and S. Vanderplank had made no such contracts for the loan and forbearance of money as came within the intention of the said statute, they should have traversed or denied the statement in the plea, that the said B. Vanderplank and S. Vanderplank had made such contracts as are set forth, instead of admitting such facts as they have done; or if the plaintiffs had intended to insist that the same contracts and agreements were not such contracts and agreements as came within the protection of the above-named statute, they should have shewn by their said replication that this present action was commenced before the passing of the said last-mentioned statute, or that the said contracts were made and entered into by and between the said B. Vanderplank and S. Vanderplank, before the passing of the last-mentioned statute, or such other matters as the case might have required.

Wightman, in support of the demurrer.—The replication is no answer to the plea. It does not appear from the plea when the contract was made, whether before the passing of the stat. 2 & 3 Vict. c. 37, or since. The plaintiff ought to have shewn it to have occurred before the recent statutes relating to usury. The first of those statutes (the 3 & 4 Will. 4, c. 98) was passed in the year 1833, and by the 7th section

of that statute, bills of exchange and promissory notes, payable at or within three months after date, are exempted from the operation of the usury laws. The next statute (the 7 Will. 4 & 1 Vict. c. 80) which was passed in the year 1837, extended the provisions of that section; but no question arises in the present case on either of those statutes, which are applicable only to bills of exchange and promissory notes. The 2 & 3 Vict. c. 37, was passed in the year 1839, to *amend* and extend the operation of the 7 Will. 4 & 1 Vict. c. 80 to the year 1842; and by the first section of that statute it is enacted, that “no *contract* for the loan or forbearance of money above the sum of £10 sterling” shall, by reason of any interest taken thereon or secured thereby, be void by reason of any statute or law in force for the prevention of usury, except as to loans made on the security of lands; but there is no security here which brings this case within that exception. [Lord Abinger, C. B.—Are not those words confined to such contracts as arise on bills of exchange or promissory notes?] The section clearly comprehends two distinct cases: the first applies to contracts arising on bills of exchange payable twelve months after date; the other is applied to all contracts where the sum exceeds £10; with respect to bills of exchange there is no such limitation. The replication, therefore, furnishes no answer to the plea; for a contract for the payment of more than £5 per cent. interest on the loan or forbearance of money, is not illegal since the 2 & 3 Vict. c. 37, unless the amount of the loan does not exceed £10, or it is made upon the security of lands. The allegation in the replication, that “it was *corruptly*, and *against the form of the statute* in such case made and provided, agreed,” &c., is not sufficient. The word “corruptly” is merely a technical expression, and means no more than *duly* or *feloniously* would. As to the words “against the form of the statute,” the contract may be contrary to the 12 Anne, c. 16, and yet be protected by the 2 & 3 Vict. c. 37. [Parke, B.—The

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question is, what must the plaintiff prove in support of the replication? It would be necessary to prove enough to constitute the offence.] The statute of Anne remains in force, though it has become inoperative in certain cases. The defendant could not, therefore, take issue on the allegation that the agreement was against the form of the statute. The plea discloses a legal contract, and it is for the plaintiff, if he seek to invalidate it, to shew, beyond doubt, that the contract was illegal; for no presumption can be made in favour of illegality. All that the plaintiff in his replication says is, that it is "against the form of the statute," which it may be, and yet the contract may be perfectly legal. [*Parke, B.*—The meaning of that allegation is, that it is against the form of *some* statute then in force. Now, as the statute of Anne is suspended as to loans above £10, does not that allegation, therefore, point to the 2 & 3 Vict., and in that way disclose the illegality?] The illegality must be stated with certainty, and if in truth this were a contract for a loan not above £10, or if it came within the proviso respecting security on land, the proper form of replication would be so to state, and the illegality would then appear. If the time is material, it lies on the plaintiff to shew it; but it is submitted that the words in the act are general, and extend to all contracts, whenever made.

Petersdorff, contrà.—The defendant ought to have taken issue on the replication, and then the plaintiff must have proved that the contract was made while the statute of Anne was in force, or have relied on some other fact or matter which excepted it from the operation of the stat. 2 & 3 Vict. c. 37. The replication avers that the contract was contrary to a particular statute, and that averment is *primâ facie* sufficient; and it lies on the defendant to shew that he is protected by a subsequent statute, if such be the fact. It is an established rule, that where a party seeks by his plea to avail himself of a statute, and there is an exception con-

tained in the enacting clause, he must shew that he does not come within the terms of the exception; but if a proviso be contained in another and distinct clause, he need not do so, but it must be shewn by the opposite party (a). The same rule is applicable to informations before a magistrate, where it is not necessary to negative any matter which is not contained in the particular section relied upon. The proper course would have been to have denied the illegality, and then the question would have arisen whether this was an illegal contract or not. It was sufficient for the plaintiff to allege that the contract was against the form of the statute; and if the defendant meant to rely upon any subsequent statute which rendered it valid, he should have set up that as an answer in his rejoinder. But the replication may be sustained, even if this were a transaction which took place subsequent to the passing of the statute 2 & 3 Vict. c. 37, as that statute was not intended to apply to any other contracts than those on bills of exchange and promissory notes. The words "*as aforesaid*," contained in the first section, have reference to and must be taken in conjunction with the antecedent matter, which is bills and notes. If the legislature had intended that the clause should apply to other contracts, they would have used words which clearly expressed it. [*Alderson*, B.—How, according to that construction, can you give effect to the proviso at the end of the first clause, that "nothing therein contained shall extend to the loan of any money upon the security of any lands," &c., because that applies to mortgages—clearly not bills of exchange or promissory notes? If your construction be correct, those words would be entirely useless.]

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PER CURIAM.—There must be judgment for the defendant.

Judgment for the defendant.

(a) 1 Chit. on Plead. 6th edit. 223.

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Jan. 27.

Assumpsit by the indorsee against the acceptor of a bill of exchange, drawn by D. upon the defendant. Plea, that the defendant, by D., his agent duly authorized in that behalf, paid to the plaintiff, and the plaintiff then accepted and received of D. as such agent, a certain sum in full satisfaction and discharge of the causes of action. Replication, that the defendant, by D. his agent, did not pay to the plaintiff, nor the plaintiff accept or receive of D., as such agent, the said sum in full satisfaction and discharge of the promises in the plea mentioned:—*Held*, on special demurrer, that the replication was good.

BENNISON and Others v. THELWELL.

ASSUMPSIT on a bill of exchange drawn by H. & R. Daniel upon and accepted by the defendant, for the sum of £200, payable three months after date, and indorsed by H. & R. Daniel to the plaintiffs.

Plea, that, after the bill became due, and before the commencement of the suit, the defendant, by the said H. & R. Daniel, his agents duly authorized in that behalf, paid to the plaintiffs, and the plaintiffs then accepted and received of the said H. & R. Daniel, as such agents, a large sum of money, amounting to £210, in full satisfaction and discharge of all the promises and causes of action in the declaration mentioned. Verification.

Replication, that the defendant, by the said H. & R. Daniel, did not pay to the plaintiffs, nor did the plaintiffs accept or receive of the said H. & R. Daniel, as such agents, the said sum of money in the said plea mentioned, in full satisfaction and discharge of the promises in the said plea in that behalf mentioned, modo et formâ.

Special demurrer, assigning for causes, that it is ambiguous and uncertain from the said replication, whether the issue raised by the same is, whether the payment in the plea mentioned was made at all, or whether the said D. & R. Daniel were the authorized agents of the defendant in making the same; that the plaintiffs have not taken or tendered any single or material issue out of or upon the said plea of the defendant, but have stated and put in issue, both that the plaintiffs did not accept and receive from the said H. & R. Daniel the said sum of money, and also that the said H. & R. Daniel were not the agents of the defendant; and that the replication is bad, as containing a negative pregnant with an affirmative.

Crompton, in support of the demurrer.—Looking at the

decision in *Webb v. Weatherby* (a), perhaps it cannot be contended that the replication is double, but it is at best ambiguous and uncertain; it is uncertain whether it is intended to deny the authority of H. & R. Daniel, or the receipt of the money by the plaintiffs in satisfaction. It is quite ambiguous whether the one allegation or the other is intended to be denied. This is not a plea on which one general traverse can be taken. In *Myn v. Cole* (b), which was an action of trespass for breaking and entering a house, the defendant pleaded that the plaintiff's daughter licensed him, &c., and that he entered by virtue of that license; to this the plaintiff replied, quod non intravit per licentiam suam. This was considered to be a negative pregnant, and it was held that the plaintiff ought to have traversed either the entry by itself, or the licence by itself, but not both together. So, in *Aubrie v. James* (c), where, in trespass for an assault and battery, the defendant justified, that he, being master of a ship, commanded the plaintiff to do some service in the ship, which he refusing to do, the plaintiff moderately chastised him; the plaintiff traversed, with an absque hoc that the defendant moderately chastised him; and the traverse was held to be a negative pregnant, because, whilst it purported to put in issue only the excess, (admitting by implication the chastisement), it did not distinctly make that admission, and was therefore ambiguous. So here, the replication does not expressly admit or deny either of the allegations contained in the plea; it puts them both together, and leaves it uncertain which it intends to deny. The plea is clearly not in excuse, but in discharge, and the plaintiff must take issue on some one allegation in the plea, and cannot be allowed to traverse the plea generally.

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(a) 1 Bing. N. C. 502; 1 Scott, 477.

(b) Cro. Jac. 87.

(c) Steph. on Plead. 425, 2nd edit., citing 1 Vent. 70; 1 Sid. 444; 2 Keb. 623.

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Barstow, contra.—This defence would have been raised by the plea of the general issue before the new rules, and it was never intended by them to place the parties under any difficulty. It cannot be doubted that the plea is good; and if the defendant makes the agency a part of his defence, the plaintiff has a right to traverse it. Undoubtedly, the general replication *de injuriâ* would not have been proper; but where several facts are stated in the plea, which form but one entire defence, the whole may be traversed. It would be hard to put the plaintiff in a situation to admit a fact which may or may not be true.

Crompton was heard in reply.

PARKE, B.—It would be a good replication to a plea of payment by an agent, that he the defendant did not, by his agent in that behalf, pay, &c. The case of *Webb v. Weatherby* (a) is an authority to shew, that where two matters form but one defence, both may be included in one traverse.

The rest of the Court concurred.

Judgment for the plaintiff.

(a) 1 Scott, 477; 1 Bing. N. C. 502.

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STOCKEN *v.* COLLIN.

Jan. 30.

ASSUMPSIT by the indorsee against the drawer of a bill of exchange. Plea, no due notice of dishonour.

At the trial before *Rolfe*, B., at the Middlesex Sittings in this term, it appeared that the bill on which the action was brought became due on the 27th of April; that the plaintiff, who was then the holder of the bill, wrote a letter to the defendant, who resided in London, giving him notice of the dishonour of the bill, which letter, according to the evidence of the plaintiff's clerk, who posted it, was put into the office before one o'clock on the 28th, so that, in the due course of delivery, it would have reached the defendant on that day. The letter was produced in evidence, and bore the post-mark—ten in the forenoon, April 29. The jury found for the plaintiff, but the learned Judge gave the defendant leave to move to enter a nonsuit.

In an action by the indorsee against the drawer of a bill of exchange, it is enough for the plaintiff to shew, to the satisfaction of the jury, that the letter containing the notice of dishonour was posted in such time as that, by the due and usual course of the post, it would be delivered on the proper day.

The post-office mark is not conclusive of the time when a letter is posted.

Wordsworth now moved accordingly for a nonsuit, or for a new trial.—If the letter had been put into the office on the 28th, the presumption is that it would have been delivered on that day; but the post-office mark was conclusive against the plaintiff, and shewed that the letter was not posted in time for delivery, in due course of post, on the 28th. But further, it was not enough to shew that it was posted on the 28th; the plaintiff was bound to prove that the notice actually reached the defendant on the 28th. The post was only the agent of the plaintiff for the purpose of delivery.—He cited *Smith v. Mullett* (a) and *Hilton v. Fairclough* (b), to shew that if a notice of dishonour is sent through the post, it must be proved to have been put into the office at such an hour that, in the due course of delivery, it would have arrived in time, which he con-

(a) 2 Camp. 208.

(b) *Id.* 633.

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tended could not have been done in the present case, as the post-mark sufficiently proved.

PARKE, B.—It was a question for the jury whether the letter was put into the post-office in time for delivery on the 28th; the post-office mark certainly raised a presumption to the contrary, but it was not conclusive. The jury have believed the testimony of the witness who posted the letter, and the verdict was therefore right. If a party puts a notice of dishonour into the post, so that in the due course of delivery it would arrive in time, he has done all that can be required of him, and it is no fault of his that delay occurs in the delivery.

ALDERSON, B.—The party who sends the notice is not answerable for the blunder of the post-office. I remember to have held so in a case on the Norfolk circuit, where a notice addressed to Norwich had been sent to Warwick. If the doctrine, that the post-office is only the agent for the delivery of the notice, were correct, no one could safely avail himself of that mode of transmission. The real question is, whether the party has been guilty of laches.

ROLFE, B., concurred.

Rule refused.

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HUMBLE v. LANGSTON.

Jan. 28.

ASSUMPSIT. The declaration stated, that the plaintiff heretofore, and before and at the times of the sale and of the delivery and of the promise in this count after mentioned, was possessed of divers, to wit, thirty shares, whereof he was registered owner, in a certain railway company called the Bristol and Exeter Railway Company: that the defendant, to wit, on the 20th of February 1838, agreed to buy of and from the plaintiff, and the plaintiff to wit, then, at the request of the defendant, agreed to sell to the defendant thirty shares in the said Railway Company, at and for a certain price, to wit, the price or sum of 7*l.* 2*s.* 6*d.*, to be thereupon paid by the defendant to the plaintiff for each and every of the said shares; and thereupon, in consideration that the plaintiff, at the request of the defendant, would deliver to the defendant the certificates of the said shares so bought as aforesaid, and would transfer the said shares to him on request, he, the defendant, to wit, then promised the plaintiff to accept and receive the same of and from the plaintiff, and to indemnify and save harmless the plaintiff from all subsequent payments and liabilities for or in respect of the shares, the certificates of which he should so deliver as aforesaid, or for or in respect of any call or calls which should or might be thereafter made upon or in respect thereof. And although the plaintiff, to

On the 20th of February, 1838, the plaintiff entered into a contract with the defendant, through their respective brokers, for the sale of thirty shares in the Bristol and Exeter Railway, at 7*l.* 5*s.* per share, and the usual contract notes passed between the parties, no time being mentioned for the completion of the purchase. On the 3rd of March, the defendant wrote to the plaintiff's brokers, requesting them to "dispatch the thirty Bristol and Exeter shares forthwith," and they replied the same day, "we herewith send you transfer of thirty Bristol and Exeter shares in blank." This was accordingly done, and the purchase-

money was paid. Calls were subsequently made on these shares, and they not being registered in the name of the defendant, and the plaintiff remaining the apparent owner of them, he was compelled to pay the calls. In an action against the defendant for not indemnifying the plaintiff for the payments and liabilities in respect of the calls:—*Held*, that under the above circumstances there was no undertaking implied by law to indemnify against all subsequent calls, nor any evidence of such an undertaking in point of fact.

The declaration, after setting forth the contract, contained an averment that the plaintiff had "always from the time of the sale of the said shares, and the making of the said promise hitherto been ready and willing to transfer the said shares to the defendant, according to the terms of the said contract." This was traversed by plea:—*Held*, that there was sufficient evidence in the case of such readiness; but that if it had been necessary, in order to support the allegation, to prove the tender of a valid conveyance, it would not have been sufficient.

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wit, on the day and year aforesaid, delivered to the defendant, in performance of the said contract, the certificates of the said shares whereof he was so possessed, and was such registered owner as aforesaid, and the defendant then accepted and received the same of and from the plaintiff, and then paid him for the same, according to the terms of the said sale : and although the plaintiff hath always, from the time of the sale of the said shares, and the making of the said promise, hitherto, been ready and willing to transfer the said shares to the defendant, according to the terms of the said contract ; of all which said several premises the defendant, in a reasonable time in that behalf, to wit, on the day and year aforesaid, and during all the time aforesaid, had notice ; and although the plaintiff hath always since the said agreement well and truly performed the terms thereof in all things on his part and behalf to be performed and fulfilled ; and although, subsequently to the said sale and to the said delivery, to wit, on the several and respective days and times herein-after next mentioned, to wit, on the 14th of May 1838, the 20th of October 1838, the 6th of April 1839, the 6th of August 1839, the 6th of November 1839, the plaintiff, as such registered owner of the said shares as in this count before mentioned, became and was liable to divers respective calls respectively made, subsequently to the said promise, sale, and delivery, for and in respect of the said shares respectively, amounting altogether to a large sum of money, to wit, to the sum of £2000, and by reason of the premises the plaintiff afterwards, and before the commencement of this suit, to wit, on the day and year last aforesaid, was forced and obliged to pay, and did then actually pay a large sum, to wit, the sum of £1000, for and in respect of the said calls ; and was afterwards, and before the commencement of this suit, to wit, on the day and year last aforesaid, forced and obliged to pay and give, and did then pay and give divers, to wit, two promissory notes

of him, the plaintiff, for divers large sums of money, amounting in the whole to a large sum, to wit, the sum of other £1000, for and in respect of the said calls, which said promissory notes of the plaintiff are still respectively outstanding and unpaid, and which the plaintiff still is liable to pay and discharge; of all which said several premises in this count mentioned, the defendant afterwards, and in a reasonable time in that behalf, to wit, on the 1st of December 1839, had notice, and was then requested to indemnify and save harmless the plaintiff from the said payments and liabilities. Yet the defendant did not nor would, when he was so requested, or at any other time whatsoever, indemnify or save harmless the plaintiff from the said payments or liabilities, or any of them, or any part thereof, but therein wholly failed and made default.

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There was a second count on an account stated.

Pleas, first, to both counts, non assumpsit. 2ndly, to the first count, that there never was any such consideration for the said alleged promise of the defendant in that count mentioned, as therein alleged. 3rdly, that he, the defendant, did not agree to buy of or from the plaintiff, nor did the plaintiff agree to sell to him the defendant, the said shares in that count mentioned, or any or either of them, modo et formâ. 4thly, that the plaintiff hath not been nor was ready or willing to transfer the said shares, or any or either of them, to the defendant, modo et formâ. 5thly, that the defendant had not notice of the plaintiff's readiness or willingness to transfer the said shares, or any or either of them, to him the defendant, modo et formâ. 6thly, that he, the defendant, had not notice of the said alleged liabilities of the plaintiff in the first count mentioned, or of any or either of them, or of any part of the same, modo et formâ. 7thly, that the plaintiff hath been and was damnified as in the said first count mentioned, of his own wrong, and by and through his own means, default,

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and neglect. 8thly, that after the making of the said alleged promise in the first count mentioned, and before any breach thereof, and before the said shares, or any or either of them, had been transferred to the defendant, to wit, on the 21st of February 1838, the defendant was absolved, exonerated, and discharged by the plaintiff from his the defendant's said promise, and the performance of the same.

Replication to the 1st, 2nd, 3rd, 4th, 5th, and 6th pleas, similiter. To the 7th plea, that he the plaintiff was not damnified as in the said first count mentioned, of his own wrong, or by or through his own means, default, or neglect, modo et formâ. To the last plea, that the defendant was not absolved, exonerated, or discharged by the plaintiff from his the defendant's said promise, or the performance of the same, modo et formâ.

At the trial before *Rolfe*, B., at the last Summer Assizes at Liverpool, it appeared that the plaintiff, being in possession of thirty shares in the Bristol and Exeter Railway Company, employed Messrs. Richardson & Thompson as his brokers, to dispose of them for him. The defendant, a share-broker at Manchester, being desirous of obtaining shares in that Company, employed Messrs. Atkinson & Townley, share-brokers in Liverpool, to purchase them for him, and they applied to Messrs. Richardson & Thompson for that purpose. At that time, £10 per share had been paid on these shares, but they were at a discount. Messrs. Richardson & Thompson agreed, on behalf of the plaintiff, to sell these thirty shares at 7*l.* 2*s.* 6*d.* per share, which sum Messrs. Atkinson & Townley agreed to pay for the same, as brokers for the defendant, and in pursuance of that agreement, the shares were sold to Messrs. Atkinson & Townley for the defendant, and the following contract notes passed between the brokers.

"Liverpool, 20th February, 1838.

"Sir—We have this day sold to you thirty shares in the
Bristol and Exeter Railway at £10 0 0 paid

2 17 6 discount

£ 7 2 6 per share net.

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"Yours, &c.

RICHARDSON & THOMPSON."

"To Messrs. Atkinson & Townley."

"No. 363.

"66, Castle-street, 20th February, 1838.

"Messrs. Richardson & Co.—We have this day bought
from you the shares undermentioned,

"And remain yours,

"For G. Atkinson & Townley,

"EDWARD BOURNE.

"Thirty Shares Bristol and Exeter Railw., at 7*l.* 2*s.* 6*d.*
per share."

In pursuance of this contract, the shares were sent by the plaintiff's brokers, with a blank transfer, which at that time was stated to be the ordinary course of business. The purchase-money was paid by Atkinson & Townley to Richardson & Thompson, and was charged by the former in account with the defendant, who allowed it to them in his account. Subsequent calls were made on these shares, and the shares not having been registered in the books of the Company in the defendant's name, but the plaintiff remaining the only apparent owner of them, he was compelled to pay those calls, amounting to 957*l.* 5*s.* 2*d.*, and it was to recover the money so paid that the present action was brought. The calls were paid to the Company partly in cash, and partly in promissory notes which were outstanding. By the contract notes, the shares were sold to the defendant at 7*l.* 2*s.* 6*d.* net,

Exch. of Pleas, but Atkinson & Townley, as brokers for the defendant, 1841. would be entitled to a commission of 2*s.* 6*d.* per share for purchasing, and they, in rendering their account to the HUMBLE defendant, added the commission to the purchase-money, v. LANGSTON. which made the shares stand at 7*l.* 5*s.*

Several letters from the defendant were put in, shewing his anxiety to purchase shares in this railway, and that he had sold shares in that Company at higher prices. The following letters were also read:—

“Manchester, 3rd March, 1838.

“Messrs. Atkinson & Townley—Pray dispatch the thirty Bristol and Exeter shares forthwith. I have sold at 9*l.* 17*s.* 6*d.*

“THOMAS LANGSTON.”

“Liverpool, 3rd March, 1838.

“We herewith send you transfer of thirty Bristol and Exeter shares in blank.

“ATKINSON & TOWNLEY.

“Mr. Thomas Langston.”

“Mr. Thomas Langston.

“Bought from Atkinson & Townley,

“20th February, 1838,

“Thirty shares of Bristol and Exeter

Rails, at 7*l.* 5*s.* - - - - - £ 217 10 0

“Stamp - - 2 0 0

£ 219 10 0”

It was objected at the trial, at the close of the plaintiff's case, that in the absence of any express contract, there was no implied undertaking, on the part of the person purchasing the shares, to indemnify the vendor against

the calls, and therefore, as there was no liability, the plaintiff ought to be nonsuited. It was also objected that the averment in the declaration, that the plaintiff was ready and willing to transfer, was not proved. The learned Judge directed the jury to find their verdict for the plaintiff, which they accordingly did, with £900 damages, but he gave the defendant leave to move to enter a nonsuit on the above grounds. *Alexander*, in Michaelmas Term last, obtained a rule accordingly.

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Cresswell and *Crompton* shewed cause in this term, (Jan. 16). —The material question in this case is, whether there is any implied undertaking on the part of the purchaser of shares to indemnify the seller from subsequent calls made by the Company upon him. Another question is, whether the averment in the declaration, that the plaintiff was ready and willing to transfer the shares, which is traversed by the fourth plea, was proved at the trial. Of that there was abundant evidence. Perhaps *Hibblewhite v. M'Morine* (a) may be relied upon on the other side, but there the party never had the property to transfer, and therefore the case is totally different. Then, as to the main point, there was an implied undertaking by the purchaser to indemnify the seller from subsequent calls. In a transaction of this nature, there is an implied undertaking to protect the seller from all the consequences of his remaining the nominal or registered owner. If the plaintiff remains nominally on the books the owner of the shares, he then becomes a trustee for the purchaser, and the purchaser is bound to indemnify him from all the liabilities which he incurs by his being placed in that situation. The drawer of an accommodation bill is bound to indemnify the accommodation acceptor, because the law in such case implies a promise to indemnify, without any express promise being

(a) 6 M. & W. 200.

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made. So here, there was an implied promise to indemnify, without reference to the terms of the contract. Here shares are transferred to a purchaser, who takes them subject to all the liabilities of the vendor, under the act of Parliament by which the company was formed and regulated (a). One condition of the act is, that the purchaser of the shares shall pay all the calls. The case falls within the principle of the decision in *Burnett v. Lynch* (b). There lessee, by deed poll, assigned his interest in the demised premises to A., subject to the payment of the rent and the performance of the covenants contained in the lease. A. took possession, and occupied the premises under the assignment, and before the expiration of the term assigned to a third person. The lessor sued the lessee for breaches of covenant committed during the time that A. continued assignee of the premises, and recovered damages against the lessee; and it was held that the lessee might maintain an action on the case, founded in tort, against A., for having neglected to perform the covenants during the time he continued assignee, whereby the lessee sustained damage. Here the parties have contracted with reference to the statute, and the defendant, by purchasing these shares, has undertaken that he would perform all the liabilities to which the owner of them was subject, and free the seller from them. In *Burnett v. Lynch*, Lord Tenterden says (c)—“It is true he [the defendant] entered into no express covenant or contract that he would pay the rent and perform the covenants. But he accepted the assignment, subject to the performance of the covenants, and we are first to consider whether any action will lie against him. If we should hold that no action will lie, this consequence will follow, that a man having taken

(a) The 169th section of the Bristol and Exeter Railway Act, 6 Will. 4, c. xxxvi, was stated to be exactly the same as the 140th section of the London and Brighton

Railway Act, which see, in a note to *Hibblewhite v. M'Morine*, 6 M. & W. 205.

(b) 5 B. & C. 589; 8 D. & R. 368.

(c) 5 B. & C. 601.

an estate from another, subject to the payment of the rent, and the performance of the covenants, and having thereby induced an understanding in that other that he would pay the rent and perform the covenants, will be allowed to cast that burden upon the other person. Reason and common sense shew that that never could be intended; and if the law of England allowed any such consequence to follow, in that case it would cease to be a rule of reason." The other judges entirely concurred in that decision, which, in principle, is an authority in the present case. The seller of these shares does not enter into a new liability, but continues in his original liability at the request of the purchaser, and the law will imply a promise to indemnify from that circumstance. [*Parke, B.*—The case of *Burnett v. Lynch* was cited and approved of in *Wolveridge v. Steward* (a), in the judgment of the Court of Exchequer Chamber, delivered by Lord *Denman, C. J.*] *Burnett v. Lynch* is a strong authority to shew that assumpsit would have lain under the same circumstances. Covenant would not lie, because it was a deed poll. Suppose in the present case the purchaser had expressly requested the seller to let the shares stand in his name, would not a promise to indemnify be implied from that request? It is submitted that it clearly would: and this is substantially the same thing. The present is perhaps more like the case of an accommodation bill, than that of principal and surety. The acceptor, by accepting the bill, does not relieve the drawer from liability, but contracts a liability at his request. Here, by the original bargain, the seller had a right to call for a legal transfer of the shares, but the purchaser requests the *shares* to be sent to him. By that he means the certificates, as is shewn by what was done—they send him accordingly the certificates and a blank transfer.

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(a) 1 Cr. & M. 644.

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Alexander and Cowling, contra.—There is no analogy between the case of *Burnett v. Lynch* and the present. There the defendant was claiming a benefit under the lease, and could not gainsay it. Here the person whose name is registered is the person entitled to all the benefits to be derived from the shares. There the assignee had possession of the land, and an implied contract arose from the assignment, under which he took that benefit. Here the vendor is in the legal possession. Besides, the question in that case arose after verdict, and all would be assumed to have been proved at the trial which was necessary to sustain the action. Here, the transfers being in blank, were not legal, and could not be made legal by subsequent signature, and therefore conferred no title or benefit on the defendant. [*Parke, B.*—The question is, was not this a contract for shares, to be completed within a reasonable time, the remedy for breach of which would be an action for special damage, for not completing the contract within a reasonable time? and then the plaintiff is in this situation, that he has not tendered a valid conveyance.] It cannot be that the law will imply any promise from the defendant to indemnify the plaintiff. The parties never contemplated any such indemnity. The plaintiff would be a fortunate person indeed, if he got the price of his shares, and a promise to indemnify, without the defendant's obtaining any valid title to the shares. [*Parke, B.*—In such a case another promise to be implied would be, that the vendor should pay the profits to the vendee.] There is nothing, either in principle or authority, to shew that such a promise to indemnify would be implied by law. Suppose the case of a vendor and purchaser of land, and the agreement were not performed, could it be said that there was an implied promise, in case the outgoings were greater than the profits, to indemnify the vendor? That could not be so, at all events, before a conveyance were tendered. If the plaintiff had tendered to the defendant

a regular deed of transfer, and he had refused to execute it, then, perhaps, he might have recovered; but here there was only a transfer in blank, which was illegal. This is personal property only. That was decided in *Bligh v. Brent* (a). In Com. Dig., Covenant (A 2,) it is said, "a covenant personal is by express words, or by a covenant in law." And again (A 3,)—"The law does not create a covenant for a personal thing." The rule of law as to caveat emptor is an instance of that. If the vendor required anything beyond what is incident to the mere contract of sale, he ought to have stipulated for it: no such contract can be implied. The cases put on the other side are cases of loan. In the case of an accommodation bill, the acceptor lends his name and responsibility. So in the case of principal and surety. But here the promise laid in the declaration is founded only on the contract of sale. The case of principal and surety is totally distinct; there the surety incurs a liability, and solely a liability, for another person. But here the supposed surety has the power in his own hands of saving himself harmless, and it is a mere naked contract as between seller and purchaser. In *Hare v. Waring* (b), where the certificates tendered by the plaintiffs to the defendant did not contain the names of the plaintiffs as original proprietors, nor had they any indorsement of transfer to them, it was held that such certificates were insufficient, inasmuch as they did not shew a title in the plaintiff to convey the shares under the act of parliament.

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Cur. adv. vult.

The judgment of the Court was now delivered by

PARKER, B.—There were two questions in this case, which were argued a few days ago, on shewing cause

(a) 2 Y. & C. 268: see also *Bradley v. Holdsworth*, 3 M. & W. 422. (b) 3 M. & W. 362.

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against a rule to enter a nonsuit. First, whether, on a contract by the defendant to buy of the plaintiff some shares in the Bristol and Exeter Railway, the law implied a promise by the purchaser, to indemnify the vendor against all subsequent calls; or there was any evidence in the case to go to the jury of a promise to that effect. And secondly, whether the averment in the declaration, that the plaintiff was ready and willing to transfer, which was traversed in one plea, was proved. It appeared that the plaintiff tendered an assignment, in the form required by the 169th section of the act, but with the name of the assignee in blank, which was not objected to, and no other was required. The second objection may be easily disposed of. If it had been necessary, in order to support the allegation in the declaration, to prove the tender of a valid conveyance, this would not have been sufficient: but it being requisite only to prove a readiness to transfer, we think there was sufficient evidence in the case of that readiness. Little reliance, indeed, was placed upon this objection. The other was more strongly insisted upon. We are of opinion that, under the circumstances of this case, there was no undertaking implied by law, to indemnify against all subsequent calls, nor any evidence of such an undertaking in point of fact. On the 20th of February 1838, the contract was entered into, which was simply an agreement by the plaintiff to sell, and the defendant to buy, thirty shares, at the price of 7*l.* 5*s.* per share, no time being specified for the completion of the purchase; nor was there any such stipulation in the contract as the conveyance itself would have contained if completed, that is, that the vendee should be subject from the date of it, or any future time, to the conditions upon which the vendor held them. If the case had rested upon this contract, the situation of the parties would have been this:—The plaintiff, after shewing a good title to the defendant, would have had a right to call upon him to complete his

purchase in a reasonable time, by preparing a deed in the statutory form ; and if the defendant had done so, the plaintiff might then have executed it, and required the defendant to do the same, and to deliver, or attend with him to deliver, the deed to the Company, that a memorial might be entered into and indorsed on the deed of transfer, pursuant to the 169th section. If all this had been done, the plaintiff would have been no longer liable to any call : if the defendant had refused to perform his part, he would have subjected himself to an action for the non-performance of that which he omitted to do ; and if, in consequence of the defendant's breach of his contract, the plaintiff had been obliged to pay future calls, he might have recovered this amount, by way of special damage for the defendant's breach of contract. But in this case, the plaintiff did not pursue the course which, according to law, he ought to have done. The defendant appears to have been satisfied with the title, and both the plaintiff and he to have been content, the one to deliver, and the other to accept, a transfer with the name of the vendee in blank ; for the purpose, no doubt, of the defendant selling and transferring those shares to another, and filling in the name of some subsequent purchaser from himself ; or, more probably, of handing over the instrument to some purchaser from himself, on receiving the price ; for the shares were clearly bought on speculation. On this occasion, when this, probably the customary course, was adopted, instead of that which the law, in the absence of custom, prescribes, the plaintiff might have insisted that he would not deliver such a blank conveyance as was asked, which might postpone indefinitely the actual conveyance to a vendee, unless the defendant would indemnify him against all intermediate calls ; and if that had been done, the plaintiff would have been safe ; but this he omitted, and there is no trace of any evidence of such a contract having been made or contemplated. The truth probably is, that the plaintiff did not think of

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this future liability at all, or if he did, he thought that the shares would be sold, after a new call, to a purchaser who would take the amount into consideration in fixing the price, and pay the calls to the Company in order to get the transfer completed.

We cannot therefore think that the plaintiff and defendant ever contemplated such an undertaking as the declaration in this case describes; and that the evidence does not warrant the jury in drawing an inference of any such engagement.

Does the law raise any such contract? We think it does not. The plaintiff, by his neglect to get the conveyance completed and the transfer entered, becomes a trustee for the defendant and his assigns, and receives the profits, and must pay the outgoings; but there is no authority for saying that the law makes any promise by a cestui que trust to a trustee, *simply* to repay all that the trustee may pay on his own account, still less on that of the subsequent cestui que trust.

The principle of the case of *Burnett v. Lynch* (a) does not apply. The assignee of a lease becomes liable to the lessor for the performance of all the covenants which run with the land, and the lessee is also liable, in the nature of a surety as between himself and the assignee, for the performance of the same covenants, during the continuance of his interest as assignee; the consequence is, that a duty is imposed on the assignee at common law to perform the covenants during that time, for which an action on the case will lie. But here the defendant contracts no liability at all with the Company, so that the plaintiff is not a surety for him; and if there were any analogy between the two cases, the defendant's implied promise would only be to indemnify against such calls as should be made whilst he should be beneficially interested, so that the promise in the declaration, which is to indem-

(a) 5 B. & C. 589.

nify against *all* future calls, is too large, and no amendment could make it good, as none of the calls, the subject of this action, seem to have been made until after the defendant himself had parted with the shares.

We are of opinion, therefore, that this action will not lie, and the rule must be absolute to enter a nonsuit.

Rule absolute.

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MAGHEE and Wife v. O'NEIL.

DEBT for money lent by the female plaintiff to the wife of the defendant before their respective marriages, and on an account stated. Pleas, *nunquam indebitatus*, and the statute of limitations. At the trial before Lord Denman, C. J., at the last Flintshire assizes, it appeared that the action was brought to recover £40, the balance of a sum of £50, alleged to have been lent by the female plaintiff to the defendant's wife, who was her sister, more than six years before the commencement of the action. For the purpose of taking the case out of the statute of limitations, the plaintiffs called a person named Cain, who proved, that about two years ago the defendant's wife requested him to go with her to the Savings' Bank at Holywell, in order to draw out £10, for the purpose of paying that sum to her sister, in part discharge of £50, which she said her sister had lent her several years before. The witness went with her accordingly, but in consequence of her having brought a wrong book, they did not obtain the money. About a week afterwards, Cain saw her again, when she told him she had taken out the £10 from the bank, and had paid it to her sister. It was objected for the defendant, on the authority of the case of *Willis v. Newham* (a), that a part payment, to defeat the

Jan. 27.
A verbal acknowledgment by the debtor, within six years, of the part payment of a debt, is not sufficient to take the case out of the statute of limitations.

(a) 3 Y. & J. 518.

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operation of the statute of limitations, could not be proved merely by the parol declaration of the debtor. *Waters v. Tompkins* (a) was also referred to. The Lord Chief Justice thought the case was taken out of the statute, and under his direction a verdict was found for the plaintiffs, damages £40, leave being reserved to the defendant to move to enter a nonsuit.

Jervis having obtained a rule nisi accordingly, citing *Willis v. Newham*, *Waters v. Tompkins*, *Trentham v. Deverill* (b), and *Bayley v. Ashton* (c),

Hayes now shewed cause.—The statute 9 Geo. 4, c. 14, s. 1, which provides that no acknowledgment or promise by words only shall be sufficient to take any case out of the operation of the statute of limitations, unless it be contained in some writing to be signed by the party chargeable thereby, at the same time expressly provides “that nothing therein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever.” The case of *Willis v. Newham* undoubtedly decided, that part payment of the debt could not be proved by the mere verbal admission of the debtor : and the decision in *Bayley v. Ashton*, in which an unsigned entry made by the defendant was held equally inadmissible for the same purpose, proceeded on the authority of that case. But there Lord *Denman*, C. J., says—“If I were called upon for the first time to put a construction upon this act of Parliament, I should be inclined to say, that acknowledgment of a debt by promise is one kind of evidence, payment another ; and that the act, while it restricted the proof of the former, left payment to be proved as any other fact may be proved.

(a) 2 C., M., & R. 723.

(b) 3 Bing. N. C. 397 ; 4 Scott, 128.

(c) 9 Law J. Rep. (N.S.) Q. B. 376 ; 4 P. & D. 204.

But in two cases, the Court of Exchequer has decided differently." It is clear that although the Court hesitated to overrule the cases already decided, they did not approve of their principle. And the Lord Chief Justice was in error in supposing that this Court had in *two* cases decided differently, for *Waters v. Tompkins* proceeded on grounds totally independent of *Willis v. Newham*, and in no degree confirmed its authority. *Parke, B.*, there says—"On the first perusal of this clause, (9 Geo. 4, c. 14, s. 1), it would seem that the proviso takes the case of part payment of principal, or payment of interest, out of the operation of the statute altogether; and therefore that these facts would not only have the same effect, but might be proved exactly in the same way that they would have been if the act had not passed, and consequently by the defendant's parol admission; which species of proof of a simple fact is not exposed to the same degree of danger as attended the admission of an acknowledgment of the debt itself." His Lordship then states the decision in *Willis v. Newham*, and adds—"This construction of the act certainly extends the remedy, and obviates the mischief to be guarded against, in a greater degree than the words taken in their ordinary sense would do. But if part payment, or payment of interest, is proved in any legal mode, and not by admission only, this case is no authority that such proof is not sufficient . . . The reason why the effect of such a payment is not lessened by the act is, that it is not a mere acknowledgment by words, but is coupled with a fact." [*Parke, B.—Waters v. Tompkins* was certainly no confirmation of *Willis v. Newham*.] The latter case, therefore, was the only decision (before *Bayley v. Ashton*) in which the proof of payment by the parol admission of the defendant was held insufficient: and it is for the Court now to consider whether it can be sustained on any legitimate principle of construction. The fact of the payment may clearly be proved by the parol evidence of a third

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person: *Tippets v. Heane* (a). *Trentham v. Deverill* is no authority against the plaintiffs: there the only question was, whether a memorandum made by the witness at the time was sufficient evidence to go to the jury of the fact of payment, the witness not being able otherwise to recollect the fact.

But even admitting the case of *Willis v. Newham* to be law, it certainly ought not to be carried any farther; and the present case is distinguishable from it, because here the parol admission is coupled with the other contemporaneous circumstances stated in the evidence of Cain, which go to prove the fact of payment. The jury had a right to decide, upon all the facts taken together, whether they satisfied them that the payment had been made.

Jervis and *Welsby*, in support of the rule.—This case is in no respect distinguishable from *Willis v. Newham*. The circumstances referred to on the other side had no connexion whatever with the admission of *payment*, but occurred a week before, at a time when no payment had been made, but the woman merely made a verbal admission of the existence of the debt, and expressed an *intention* to pay money on account of it. How can the verbal admission of the debt, which, by the express terms of the statute, can have no effect, be brought in aid of the verbal admission of part payment? The case stands, therefore, altogether upon that admission, and is identical with *Willis v. Newham*. And even though the Court may entertain doubts whether that case was rightly decided, they will not overrule it, recognised as its authority has been by the Court of Queen's Bench in *Bayley v. Ashton*, which even carried the principle further. It has been suggested that the Court were misled, in that case, into a supposition that *Willis v. Newham* had been expressly confirmed in *Waters v. Tompkins*; but

(a) 1 C., M., & R. 252.

that is not so; for although Lord *Denman* appears to have supposed that such was the case, both *Littledale*, J., and *Patteson*, J., were evidently aware of the extent of the decision in *Waters v. Tompkins*, and that there was in that case independent proof of the fact of payment. But further, the stat. 9 Geo. 4, c. 14, s. 1, may well be read so as to support the decision in *Willis v. Newham*; the proviso as to part payment being referred to the case of *joint contractors*, which is provided for in the clause immediately preceding. The statute having provided that no joint contractor should lose the benefit of its enactments, so as to be chargeable even upon a *written* acknowledgment or promise made by his co-contractor, the proviso is then introduced to save the operation of *part payment* by a joint contractor; which has, accordingly, since the statute as before, been held sufficient to charge his co-contractors (*a*).

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LORD ABINGER, C. B.—If this question were *res integra*, I should certainly say that the mode of payment of principal or interest was left by Lord *Tenterden's* act to be proved as at common law. But we are not sitting here as a Court of error, and the cases which have been referred to compel us to say that this rule must be made absolute. My impression however is, that the act of Parliament has been pressed beyond its intention. The best way always is to adhere to the words of a statute.

PARKE, B.—The case of *Willis v. Newham* is expressly in point, and that of *Bayley v. Ashton* is even stronger than the present case. My feeling certainly is, that those decisions have gone too far; but sitting as we do, with a co-ordinate jurisdiction only, we cannot overrule the judgment of the Court of Queen's Bench. And although Lord *Denman's*

(a) See *Channell v. Ditchburn*, 5 M. & W. 494, and the cases there cited.

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judgment in *Bayley v. Ashton* seems to have been pronounced under an impression that *Waters v. Tompkins* had confirmed the authority of *Willis v. Newham*, the other judges appear to have had their attention drawn to the terms of the decision in that case. We are not to pronounce our judgment here as a Court of error. The plaintiff may, if he chooses, commence a fresh action, and may then have the opinion of a Court of error upon the question. If it comes before us in that shape, I shall then hold myself fully at liberty to consider it independently of the cases; but in the present state of the law upon the subject, I think we cannot refuse to make this rule absolute.

ALDERSON, B., concurred.

Rule absolute for a nonsuit.

MOORE and Another, Assignees of TOMPKINS, a Bankrupt,
v. PHILLIPPS, Esq.

Jan. 29.

The stat. 2 & 3
Vict. c. 29, s. 2,
does not apply
to a case where
the assignees in
bankruptcy
were appointed
before its pass-
ing.

THIS was an action of trover against the sheriff of Herefordshire, to which he pleaded, that a writ of fieri facias was directed to him as such sheriff, commanding him to levy a certain sum on the goods and chattels of the said Henry Tompkins, by virtue of which writ, after the bankruptcy of the said H. Tompkins, and before the issuing of the fiat, to wit, on the 5th of April, 1839, the defendant took in execution the goods and chattels in the declaration mentioned, and sold them: that on the 4th of May, 1839, a fiat in bankruptcy issued against the said H. Tompkins, under which he was adjudged a bankrupt, and that the plaintiffs, on the 20th of June, 1839, were appointed his assignees; that the said writ of fieri facias so issued against the said H. Tompkins, was bonâ fide

issued, and levied by the defendant, before the date and issuing of the fiat, and that neither the execution creditor nor the defendant, at the time of executing and levying the same, had notice of any prior act of bankruptcy committed by the said Henry Tompkins.

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Replication, that the plaintiffs were appointed assignees of the said H. Tompkins, and that the defendant committed the grievances in the declaration mentioned, before the passing of the statute 2 & 3 Vict. c. 29.—Verification.

General demurrer, and joinder.—The point marked for argument on the part of the defendant was, that the stat. 2 & 3 Vict. c. 29, was retrospective, and gave the law to this case.

Shee, Serjt., in support of the demurrer (a).—The object of the stat. 2 & 3 Vict. c. 29 was to destroy altogether the doctrine of relation, by which the title of the assignees, having reference back to the act of bankruptcy, would defeat a bonâ fide execution levied afterwards, although before the fiat. The first case in which a construction was put upon the statute, was that of *Edmonds v. Lawley* (b). That case differs from the present, because there the fiat issued after the passing of the act, although the execution was levied before it. *Parke*, B., there says—“If in this case a fiat had issued, and assignees had been appointed before the passing of the act, they would have had a vested right to the property of the bankrupt from the time of the seizure, and it would have been unjust to construe the act so as to defeat that right.” But in a subsequent case of *Luckin v. Simpson* (c), where the fiat did issue, and the assignees were appointed, before the passing of the act, the Court of Common Pleas nevertheless held that it had

(a) Jan. 20, before Lord Abinger, C. B., *Parke*, B., *Gurney*, B., and *Rolfe*, B.

(b) 6 M. & W. 285.

(c) 6 Bing. N. C. 353.

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a retrospective operation to protect an execution bonâ fide levied after the act of bankruptcy, without notice. [*Parke*, B.—I doubt whether the Court were aware, in that case, that the appointment of the assignees was before the passing of the act. I know from personal communication with them, that they had not taken into consideration, that the effect of holding the statute to apply to such a case would be to take away from the assignees property which had already vested in them, and which perhaps they had actually distributed among the creditors.] The Lord Chief Justice, in delivering the judgment of the Court, says—“We are of opinion, looking at the words of the statute, that it gives the law to *all* cases that come for adjudication before the Court, where the execution was executed before the fiat in bankruptcy, whether the transaction brought before the Court took place before or after the passing of the statute.” In *Nelstrop v. Scarisbrick* (a), the fiat was levied before, but the assignees were not appointed until after, the passing of the act : but this Court expressed their full concurrence with the decision in *Luckin v. Simpson*. Lord *Abinger*, C. B., says—“I go the full length of the doctrine laid down by the Court of Common Pleas I am of opinion, that the proper construction of this act is, that in *all* cases where the execution creditor bonâ fide issues and levies his execution, and a sale of the goods takes place, before any of the proceedings in bankruptcy, that execution and sale are not to be prejudiced by a previous act of bankruptcy, of which he had notice.” *Alderson*, B. also expressed his opinion that the Court was bound by the decision in *Luckin v. Simpson*. In truth, the effect of the doctrine of relation, which this act was intended entirely to destroy except in cases of fraud, was to divest rights which were otherwise vested. The execution creditor would have had a vested interest but for the construction put upon the bankruptcy acts.

(a) 6 M. & W. 684.

Erle appeared to support the replication, but

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LORD ABINGER, C. B., said—The inclination of the Court is to decide with the plaintiffs, but we think we ought first to consult the Judges of the Court of Common Pleas. If they agree with us in opinion, we shall not call on Mr. *Erle*; if they still entertain any doubt, we shall hear him.

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Cur. adv. vult.

The judgment of the Court was now delivered by

LORD ABINGER, C. B.—In this case the opinion of the Court is, that the statute is not retrospective, so as to affect rights vested before the passing of the act. That was our opinion during the argument of my brother *Shee*, and we still retain that opinion. As to the case of *Luckin v. Simpson*, we have consulted the Judges of the Court of Common Pleas, and they have stated to us (and indeed it sufficiently appears from the report), that the fact of the appointment of assignees having been previous to the passing of the act, either did not exist, or was not represented to the Court; and that if it had, they should have been of the same opinion as we are, that the statute does not apply, where it would operate to defeat rights antecedently vested in the assignees. The judgment must therefore be for the plaintiffs.

Judgment for the plaintiffs.

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Where a constable, appointed under the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 76, is sued for an act done in the exercise of his general duty as a constable, and the plaintiff discontinues, the defendant is entitled to double costs under the 21 Jac. 1, c. 12, s. 5, and not merely to costs as between attorney and client, under the 5 & 6 Will. 4, c. 76, s. 133.

MABERLY *v.* TITTERTON.

THIS was an action of assault and false imprisonment against the defendant, who was a constable for the borough of Cambridge, appointed in pursuance of the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 76 (*a*): to which the defendant pleaded not guilty (by statute). The defendant had taken the plaintiff into custody for an alleged breach of the peace. After notice of trial, the plaintiff discontinued.

Gunning having obtained a rule nisi to enter a suggestion for double costs, under the statute 21 Jac. 1, c. 12, s. 5,

Byles shewed cause.—The defendant is a constable appointed under the provisions of the Municipal Corporation Act. He is not, therefore, entitled to double costs under the statute of James, but only to costs as between attorney and client, under the 133rd section of the Municipal Corporation Act (*b*). The defence to the action rests

(*a*) Which enables the watch committee of any borough from time to time to appoint a sufficient number of fit men, who shall be sworn in before some justice of the peace, having jurisdiction within the borough, to act as constables for preserving the peace by day and by night, and preventing robberies and other felonies, and apprehending offenders against the peace: “and the men so sworn shall not only within such borough, but also within the county in which such borough or part thereof shall be situate, and also within every county being within seven miles of any part of such borough, and also within all liberties in any such

county, have all such powers and privileges, and be liable to all such duties and responsibilities, as any constable duly appointed now has, or hereafter may have, within his constablewick, by virtue of the common law of this realm, or of any statutes made or to be made, and shall obey all such lawful commands as they may from time to time receive from any of the justices of the peace, having jurisdiction within such borough or within any county in which they shall be called on to act as constables, for conducting themselves in the execution of their office.”

(*b*) Which enacts, “that all actions and prosecutions to be com-

upon the ground that the defendant, at the time of the assault complained of, was acting in the execution of his duty, as a constable appointed under the provisions of that act. At all events, a suggestion is not necessary: *Finlay v. Seaton* (a), *Wells v. Ody* (b), *Fosbrooke v. Holt* (c). The plaintiff is thereby saddled with the additional costs of this application, which also will be doubled. The Master might have taxed the double costs upon the affidavits, without any order of the Court.

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Gunning, contra.—It is true that the defendant was appointed, under the provisions of the 5 & 6 Will. 4, but, by the express words of the act, as soon as he was appointed, he had all the privileges of a constable appointed at common law: and the act complained of by the plaintiff was not an act done in pursuance of the statute, within the meaning of the 133rd section, but in the execution of his general duty as a constable. Secondly, it is the usual practice to enter a suggestion in cases like the present. In *Finlay v. Seaton*, the cause had been tried, and the defendant had had a verdict. Here the Master has not, without some rule of the Court, any materials for taxing the costs otherwise than in the ordinary manner. The rule for a discontinuance is matter ex parte. In *Fosbrooke v. Holt*, the rule was disposed of on the ground that the plaintiff had already offered to pay the double costs. Mr. Tidd (d) states the rule to be, that wherever it does not appear on the face of the record that the defendant is entitled to the

menced against any person for any thing done in pursuance of this act, shall be laid and tried in the county where the fact was committed, &c. &c.: and if a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action after issue joined, or if upon demurrer or otherwise judg-

ment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client," &c.

(a) 1 Taunt. 210.

(b) 2 C., M., & R. 184.

(c) 1 M. & W. 205.

(d) Tidd. Pr. 988.

Exch. of Pleas, benefit of the act, the proper mode is to apply to the Court
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LORD ABINGER, C. B.—There are two questions in this case; first, what costs the defendant is entitled to; and secondly, whether this is a proper application. If the defendant was acting in pursuance of the Municipal Corporation Act, that act would also govern his title to costs: but as it makes him a constable, with all the privileges belonging to the office at common law, the statute of James applies to all cases in which he is acting in the exercise of his common-law authority, and entitles him in such cases to double costs. That appears to have been the case here. We cannot give full effect to the 76th section, unless we interpret it to mean, that whatever the constable does by virtue of his general authority as such, shall have all the protection thrown round it by the law. Then, as to the other point, this is a case in which the plaintiff has discontinued, and there is no judge to try the cause, and grant a certificate under the 7 Jac. 1, c. 5: the Court alone can give a direction on the subject. Probably a suggestion is not necessary, but it is necessary for the Court to give some direction. We think, therefore, that there should be a rule directing the Master to tax the defendant his double costs, without taxing the costs of this rule.

PARKE, B.—The rule asks for too much, because a suggestion is not necessary in this case. A suggestion on the record is necessary only where it is needed for the purpose of reconciling some contradiction which would otherwise appear on the face of the record. It is required where the burthen of costs is to be shifted, as where the plaintiff ought to have proceeded in a Court of Requests: but the same reason does not apply to a case of double costs, because it never appears on the record whether the costs are

double or treble. I entirely agree, therefore, with the decision of the Court of Common Pleas, in *Finlay v. Seaton*, that a suggestion in cases under statutes of this nature is not necessary. The rule, therefore, asks for too much: but as it is proper that there should be some authoritative document on which the Master should act in taxing the double costs, I think there should be a rule in the terms stated by the Lord Chief Baron. As to the other point, I entirely agree with him as to the construction of the Municipal Corporation Act. The 76th section gives to constables appointed under that act all the authorities and privileges of constables at common law.

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ALDERSON, B.—I am of the same opinion. The statute of James applies to all constables, however appointed. The Municipal Corporation Act gives a particular form of appointment, but entitles the party to do all that constables might do at common law. It follows that he is entitled to the protection of the statute of James. If indeed his authority were limited to particular matters, it would be different.

Rule accordingly.

PEARCE v. SWAIN.

HEATON moved for a rule to shew cause why the distringas issued in this cause, and all subsequent proceedings, should not be set aside for irregularity. The affidavits stated, that the original writ of summons issued on the 5th of July last, but it was not stated in the plaintiff's affidavit on which the distringas was obtained, that any attempt had been made to serve that writ. On the 5th of Decem-

Jan. 29.

A distringas may issue after the expiration of four months from the issuing of the writ of summons.

A writ of summons was issued on the 5th of July, but it did not appear whether any attempt

was made to serve it or not. On the 5th of December, an alias writ of summons was sued out, and the plaintiff not being able to effect service of it, obtained a distringas, as for non-appearance to the original writ of summons:—*Held*, that the distringas was not irregular.

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ber, an alias writ of summons was sued out, and the plaintiff having been unable to serve the defendant with this writ, obtained the *distringas*, in which it was stated that the goods were to be distrained in consequence of the defendant's not having appeared "according to the exigency of a writ of summons bearing teste on the 5th day of July, 1840." It was now contended that the *distringas* was irregular, having been obtained upon the service of an alias, which was not a continuation of the first writ; and that it should have stated a non-appearance of the defendant to the second, and not to the first writ, which had ceased, after the expiration of four months from the teste of it, to have any operation.

LORD ABINGER, C. B.—The first writ of summons is not absolutely defunct at the end of the four months, but is only so for the purpose of preventing the suspension of the statute of limitations. I do not see that the *distringas* was irregular. The defendant is required to appear to the first writ, which was the commencement of the suit. Indeed, for aught that necessarily appears on the affidavits, the first writ might have been served.

PARKE, B.—The *distringas* issues in consequence of the non-appearance to the first writ, which is the commencement of the suit. There is no irregularity in that. A defendant may appear to a writ after the expiration of the four months. And it is now settled by the case of *Norman v. Winter* (a), that a *distringas* may issue and bear teste after the expiration of a previous writ of summons. The Court of Common Pleas had indeed before held that a *distringas* so issued was irregular (b), but they were afterwards satisfied that they were wrong, and in *Norman v. Winter*

(a) 5 Bing. N.C. 279; 7 Scott, 251. N. C. 478; *Lemon v. Lemon*, 2

(b) See *Abbotts v. Kelly*, 3 Bing. Scott, 506.

they retracted their former decision. The rule as now established, is certainly the reasonable one; for as the plaintiff is to have four months in which to serve his writ, and the attempt to serve it may take place on the last day of the four months, it would be most unreasonable to hold that he could not be entitled to a *distringas* after that time.

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ALDERSON, B., concurred.

Rule refused.

SPRY v. BROMFIELD.

THE following case was sent by his Honour the Vice-Chancellor, for the opinion of this Court.

Philip Bromfield, late of Rope Hill, in the parish of Boldre, in the county of Southampton, deceased, was at the time of signing and publishing his last will and testament hereinafter set forth, and thenceforth down to and at the time of his death, seised in fee simple of certain estates situate and being in the said parish of Boldre, and called or known by the name of the Rope Hill estate; and being so seised, duly signed and published his last will and testament in writing, executed and attested as was then by law required for passing freehold estates by devise, bearing date the 14th of February, 1799, and thereby gave and devised as follows (that is to say):—"To my executors in trust, who shall hereafter be named, I give all my estates real and personal, monies in the funds, outstanding debts due to me, and all other chattels, goods, and effects whatsoever I may die possessed of, to be disposed of by them as follows:—To my wife Celia Bromfield I give all my real estates, houses and lands, furniture,

Jan. 30.

A testator devised his real estates at B., after the decease of his wife, to J. B., "but at his death the whole to be for J. B.'s wife and children, and which children, at the death of their mother, should inherit the same jointly during their lives; and if the said children should die before they arrived at the age of 21, the testator willed that the estates should go to H. S., and to the use and benefit of him and his children." J. B. and his wife had five children, one of whom died in the lifetime of the testator, another died

after his death under 21, and a third attained 21 and died unmarried and intestate. The two surviving children, after the death of the testator's widow, and of their parents, executed a disposition under the 3 & 4 Will. 4, c. 74, for barring all remainders in the estates at B.:—*Held*, that these two children took an estate in fee-simple, as tenants in common, in the estates in question.

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plate, books, clothes, and linen, for her sole use and benefit as long as she shall live; and within one year after my death I give the following legacies [stating them]. I charge my estates at Lymington and Boldre, real and personal, with a rent-charge of £50 per annum to my sister Mary Bromfield, of Lymington, to be paid to her half-yearly during her life by my wife; and after her decease (if my sister outlives her), the said rent-charge to be continued to my said sister for the term aforesaid, by whoever may possess my houses, lands, and estate in Boldre parish: and at and after the decease of my wife, I give my houses, lands, and estates in the parish of Boldre to my cousin, the Rev. John Bromfield, subject to the rent-charge above mentioned, but at his death the whole shall be for the use of the said John Bromfield's wife and children; and which children, at the death of their mother, *shall inherit the same jointly during their lives*; and if the said children shall die before they arrive at the age of twenty-one, I will that my houses and estate in the parish of Boldre go to the Rev. Hume Spry, and to the use and benefit of him and his children." And after bequeathing a few specific legacies, the testator appointed his wife, Sir Giles Rooke (then one of the Justices of the Court of Common Pleas), and William Forsteen, executrix and executors of his will.

The testator departed this life in the said year 1799, without having altered or revoked his said will, leaving the Rev. John Hume Spry, D.D., the plaintiff in this suit, (in the said will called the Rev. Hume Spry) his heir at law, and the will was proved by his widow and William Forsteen in the proper Ecclesiastical Court. The said Celia Bromfield, the widow of the testator, entered into the possession of the devised estates in the parish of Boldre upon or soon after the testator's death, and continued in such possession down to her death in 1831. The said Rev. John Bromfield and Ann his wife, named in the will, had five children,

namely, Henry John Bromfield, (who died an infant in the lifetime of the testator), Eliza Bromfield, Georgiana Bromfield, Laura Bromfield, and William Arnold Bromfield. Eliza, Georgiana, and Laura Bromfield were all born in the testator's lifetime, and, together with their parents, were all living at the respective times of his making his will, and of his death. William Arnold Bromfield was born in 1801. The said Rev. John Bromfield died in the year 1801, intestate, leaving the said Ann Bromfield his widow, and his four last-named children, him surviving. The said Georgiana Bromfield, one of the said children, attained the age of twenty-one years; Laura, another child, died under that age; and both Georgiana and Laura died without having been married, and they respectively left the said Ann Bromfield their mother, and the said Eliza Bromfield and William Arnold Bromfield, their sister and brother, them surviving, also leaving the said William Arnold Bromfield their heir-at-law. Georgiana Bromfield did not execute any assurance of her estate or interest in the Boldre property, which she might be held to have been capable of conveying, or any assurance by which a joint tenancy might have been severed. The said Ann Bromfield died on the 9th of May 1832, intestate as to real estate, leaving the said Eliza Bromfield and William Arnold Bromfield her surviving, and the said William Arnold Bromfield was and is her heir-at-law. The said Eliza Bromfield and William Arnold Bromfield (who are the defendants in this suit), on the death of their mother, entered into possession of the entirety of the said devised estates in the parish of Boldre, claiming under the said will of the said Philip Bromfield, and have ever since been and still are in possession thereof. Some time after the death of the said Ann Bromfield, the said Eliza and William Arnold Bromfield duly made and executed a disposition for barring all estates tail, remainders, and reversions in the said premises, under the stat. 3 & 4 Will. 4, c. 74,

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and thereby limited the use to themselves and their heirs, as tenants in common.

On the 26th of July 1838, the said Dr. John Hume Spry filed his bill in the High Court of Chancery against the said Eliza Bromfield and William Arnold Bromfield, setting forth the said will, and the several facts and circumstances hereinbefore stated, and also stating (amongst other things), that according to the true construction of the said will, the said Eliza Bromfield and William Arnold Bromfield were joint tenants for life only of the said devised estates in the parish of Boldre, and that the devise or limitation over in the said will contained, to or for the use of the plaintiff and his children, in case the children of the said John Bromfield and Ann his wife should die before they arrived at the age of twenty-one years, having become incapable of taking effect, the reversion in fee simple, immediately expectant upon the determination of the said estates for life of the said Eliza Bromfield and William Arnold Bromfield, had become absolutely vested in the plaintiff, as the heir-at-law of the said testator; and also alleging divers acts of waste, and praying an account and injunction, &c. To this bill the defendants filed a general demurrer for want of equity, and the plaintiff having joined in demurrer, the cause came on to be heard before the Vice Chancellor on the 12th of February 1839, when his Honour was pleased to order that a case should be made out for the opinion of the Judges of this Court, and that the question to be submitted to the said Court should be as follows, viz. :—

What estate do the defendants, Eliza Bromfield and William Arnold Bromfield, take in the lands at Boldre, devised by the will of the testator, Philip Bromfield?

The points of argument stated for the plaintiff were the same as those set forth in the bill. The defendant's points were as follows :—

First, that the Rev. John Bromfield took an estate tail, either in possession or in remainder expectant on the life estate of himself and his wife, which estate tail descended on the defendant William Arnold Bromfield (a) : or,

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Secondly, that the defendants became, in the events which happened, joint tenants for their lives, with several inheritances in fee-simple, of and in the lands at Boldre.

The case was argued in Trinity Term, 1839, by

Malins, for the plaintiff.—First, the children of John Bromfield took, under this will, only estates for life. In order to determine the question in this case, the Court must look at the general frame of the will. The first objects of the testator's bounty were undoubtedly the family of John Bromfield, to a certain extent: then, in a certain event, he gives the estate over to the plaintiff. That event not having happened, the plaintiff cannot claim under the express devise to him; but he claims the reversion in fee expectant on the life estates of the defendants, as being undisposed of by the will. In order to deprive an heir-at-law of what he would otherwise take, there must be words used sufficient to shew a plain intention in the testator to give it to another. Here, if the devise had stopped with the words, "at his death the whole shall be for the use of the said John Bromfield's wife and children,"—it is clear they would have taken as joint tenants for life only. Then the will goes on—"and which children, at the death of their mother,"—shewing that she was to take for life only,—“shall *inherit* the same jointly during their lives.” Thus far, also, all that the defendants could rely upon to shew that they are more than joint tenants for life, is the word *inherit*. A devise in remainder to a man and his wife, and after the decease to their children, they having children at the date of the will, gives only an

(a) This point was abandoned on the argument.

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estate for life to the parents, with remainder to their children for life: *Wild's case* (a). But the defendant relies on the devise over in case of the death of the children under twenty-one. There are undoubtedly cases in which a gift to A., without words of limitation, and if he die under a certain age, then over, has been held to give a fee by implication, because otherwise the words of the devise over would be unnecessary. But this case is distinguishable by reason of the express words "jointly during their lives." There is no case in which a gift to A., *for life*, with a devise over in a particular event, will give a fee: in all the cases in which it has been so held, the original devise was unqualified in its terms; as in *Purefoy v. Rogers* (b), *Doe d. Bramstone v. Holliday* (c), *Doe d. Wight v. Cundall* (d). But it will be said that the devise may be made consistent, by giving an estate to the children of John Bromfield as joint tenants for life, with several inheritances in fee; in conformity with the decision of this Court in *Doe d. Littlewood v. Green* (e). But the cases in which that doctrine has been allowed to prevail, have all rested on much stronger ground than the present. The first and principal of them is that of *Barker v. Giles* (g). There the testator devised his lands to be sold for the payment of his debts and legacies, and the surplus money to be laid out in lands, and settled to the use of his two nephews, and the survivor of them, and their heirs and assigns for ever, *equally to be divided between them, share and share alike*: and it was held that they were joint tenants for their lives, with several inheritances. But there there were apt words to create a joint tenancy, and also proper words to raise a tenancy in common. In *Turkerman v. Jeoffrys* (h), again, the words were—"to J. & E., equally to be divided between

(a) 6 Rep. 16 b.

(b) 2 Saund. 388 a.

(c) 3 Burr. 1618.

(d) 9 East, 400.

(e) 4 M. & W. 229.

(g) 2 P. Wms. 280; 9 Mod. 157.

(h) Holt, 370.

them during their lives, and after the death of them two, then to the heirs of J." So, in *Doe d. Littlewood v. Green*, there were words apt for the creation of a tenancy in common:—"to E. G. & J. P., equally between them, to take as joint tenants, and their *several and respective* heirs and assigns for ever;" and but for the introduction of these words, they would clearly have been joint tenants in fee. The rule of law on this subject is stated in Litt. s. 283. Here there are no words from which to collect a gift of several inheritances. A tenancy in common, although the Courts lean in favour of it, cannot be given without some words authorizing such a construction, and all the cases to that effect have proceeded on words importing a division, as "amongst," "equally to be divided," &c. A devise, whether of land or personalty, to several persons, always makes a joint tenancy, unless there are some words importing a division amongst them: *Campbell v. Campbell* (a), *Crooke v. De Vandes* (b). If, therefore, the inheritance be given at all here, it is in joint tenancy. But then, it will be said, the subsequent words of the will shew that it is given only for the benefit of those children who arrive at the age of twenty-one; and that as their interests must come in esse at different periods, they cannot therefore take as joint tenants. But where there is a devise to a class preceded by an estate for life, it is not necessary, in order to create a joint tenancy, that they should take an interest at the same time, although it would be so if there were no prior estate: *Oates v. Jackson* (c). In Fearne's Cont. Rem. 312, it is said—"Where a contingent remainder is limited to the use of several, who do not all become capable at the same time; notwithstanding it vests in the person first becoming capable, yet it shall devest as to the proportions of the persons afterwards becoming capable, before the determi-

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(a) 4 Bro. C. C. 15.

(b) 9 Ves. 591.

(c) 2 Stra. 1172.

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nation of the preceding estate; and they may take jointly, notwithstanding the different times of vesting." It is submitted, however, that the children, by the express words of the will, take as joint tenants for their lives only.

Hodgson, contra.—There is no misuse of *technical* words in this will, and it is obvious that the testator intended to devise all his estate. When he disposes of this estate, he departs from all attempt at technical expression, and his intention is apparent, that John Bromfield and his family should take the whole estate, unless in the event of all the children dying under twenty-one; that is, under the time of their ability to dispose of the estate. According to the argument on the other side, if they arrived at the age of twenty-one, the estate would go over to some unknown person. In *Trant v. Hanning (a)*, the words "trustees of inheritance" were held sufficient to carry the whole fee. So here, the words "shall inherit the same," shew the intention of the testator to deal with the whole estate. If so, after the death of John Bromfield and his wife, the children are to have the inheritance, but only in case they live to the age of twenty-one; if they die under that age, then it is to go over to another person. The only difficulty then arises from the introduction of the words "jointly during their lives." It must be admitted that a tenancy in common cannot arise without some words importing a division—except where the estate is to vest at different times. In Co. Lit. 188. a., it is said—"If lands be demised for life, the remainder to the right heirs of J. S. and of J. N.; J. S. hath issue and dieth, and after J. N. hath issue and dieth, the issues are not joint tenants, because the one moiety vested at one time, and the other moiety vested at another time." In *Oates v. Jack-*

(a) 10 Ves. 495; S. C. 1 N. R. 116.

son, this position of Lord *Coke* is said not to be inconsistent with that decision; but in this and other cases, the distinction appears to have turned on some peculiarity arising out of the Statute of Uses. Here the apparent intention to give a tenancy in common is not sufficiently contradicted by the word "jointly." Nor are the words "during their lives" conclusive against the defendants. Where there are successive devises to different parties *for their lives*, and afterwards, for default of issue, over, these are, notwithstanding those words, held to be estates tail. Those cases stand in *pari ratione* with those cited for the plaintiff: the one set of words shew that the testator did not intend to give the estate over in any other event than that mentioned in the will; the other, that he did not intend to give it over until the issue was spent. The same reason applies to both; there are words inconsistent with the general intention, but the Courts so control them as not to defeat that intention:—see *Murthwaite v. Jenkinson* (a), *Wollen v. Andrews* (b), *Doe d. Gallini v. Gallini* (c). It cannot undoubtedly be contended that the word "inherit" means more than that the children shall take the inheritance of the estate as purchasers—not that they shall take *by* inheritance, i. e. by descent. But the Court may imply either cross remainders, or a joint estate for their lives, with several inheritances after the death of all.

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Malins, in reply.—The argument on the other side rests principally on the presumed intention of the testator not to die intestate. Now, a case of very probable occurrence is left wholly unprovided for. If the devise gives a fee, then, in the event of all the children dying under twenty-one, it is devested; and to make the argument on the other side complete, it should have appeared that that re-

(a) 2 B. & C. 357; 3 D. & R. 765.

(b) 2 Bing. 126; 9 Moore, 248.

(c) 5 B. & Adol. 621; S. C. in error, 3 Ad. & E. 340; 4 Nev. & M.

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version is disposed of: whereas the devise to the plaintiff is only to himself and his children, which does not give a fee: *Wild's case* (a). [*Hodgson*.—A man can never be said to die intestate who devises the *inheritance*, although he leaves the reversion in fee to descend.] The authority from Co. Litt. 188. a., comes within the class of cases before referred to, where there is no preceding particular estate, and therefore the joint tenants must take at the same time. The cases cited as to estates tail are not disputed: there the Court holds the first devise to be an estate tail, to further the general intention: and here, if there had been a gift over *on failure of issue*, that would have enlarged the original devise into an estate tail. *Trant v. Hanning* is quite a different case from the present: there it was clear that the testator intended that annuities and charges should be paid by the trustees, for which purpose they must take the legal fee.

Cur. adv. vult.

No judgment was publicly given, but the following certificate was now sent:—

“We have heard this case argued by counsel, and have considered it, and are of opinion that the defendants, *Eliza Bromfield* and *John* (b) *Arnold Bromfield* take an estate in fee simple, as tenants in common in the lands in *Boldre*, devised by the will of the testator *Philip Bromfield*.—Dated this 30th day of January, 1841.

“ABINGER,
 “E. H. ALDERSON,
 “J. GURNEY,
 “W. H. MAULE” (c).

(a) 6 Rep. 16, b.

(b) By mistake for *William*.

(c) Another case, somewhat varied in its terms, has since been

sent for the opinion of the Court of Queen's Bench. See 10 Simons, 224.

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GIBSON and Others, Assignees of WIGGINS, a Bankrupt,
v. OVERBURY and Another.

TROVER by the plaintiffs, as assignees of James Wiggins, for a policy of assurance. Plea, that the plaintiffs were not possessed, &c. At the trial before *Alderson, B.*, at the sittings in Middlesex after Michaelmas Term, 1840, a verdict was taken for the plaintiffs for the damages in the declaration, subject to the opinion of the Court upon the following case.

This action was brought to recover a policy of assurance effected by the bankrupt, James Wiggins, on the life of R. H. Andrew, with the Norwich Union Society, in the sum of £440, and at the annual premium of 12*l.* 19*s.* 7*d.* The policy was effected on the 15th March 1824, at which time Wiggins was a trader, and so continued until and at the time of his bankruptcy.

A fiat in bankruptcy issued against the said James Wiggins on the 30th of January 1837, under which the plaintiffs are his assignees.

The bankrupt continued to pay the premium until his bankruptcy.

The policy was deposited by the bankrupt with the defendants on the 5th of May 1835, as a security for a balance due to them, and for £300 then lent. There has been no assignment in writing of the policy to the defendants; and the bankrupt, up to the time of his bankruptcy, stood in the Assurance-office books as the party insuring. No notice of any deposit or transfer of the policy to the defendants had been given to the office.

The policy was demanded by the plaintiffs before this action was brought, and the defendants refused to give it up. No part of the balance, or of the £300, was paid or tendered before the commencement of this action.

The defendants, since the bankruptcy, have paid the

Feb. 1.
Assignees of a bankrupt cannot recover in trover a policy of insurance on life, effected by the bankrupt, and deposited by him, before his bankruptcy, with the defendants, as a security for money then and previously advanced by them to him.

An instrument so deposited is not in the order and disposition of the bankrupt, with the consent of the true owner, within the meaning of the stat. 6 Geo. 4, c. 16, s. 72.

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premiums, four in number; and it is agreed, that if the plaintiffs are entitled to succeed in this action, the policy of assurance shall be delivered up to the plaintiffs, on nominal damages being taken for them, or that, if not delivered up, the Court shall direct what amount of damages shall be entered for the plaintiffs, instead of the damages in the declaration; and that the Court shall be at liberty to draw any inference of fact, as the jury might have done at the trial. But if the plaintiffs are not entitled to succeed in this action, then a verdict is to be entered for the defendants.

The said R. H. Andrew is still alive.

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover in the action; if so, a verdict is to be entered for the plaintiffs as above, but if not, then a verdict is to be entered for the defendants.

The case was argued in the former part of this Term (*Jan. 20 and 25*), by

Kelly, for the plaintiffs.—The assignees are entitled, under the circumstances stated in the case, to the possession of this policy of assurance. The only ground on which the defendants can claim to retain it is, that it has been legally assigned to them. But in this case no legal assignment has taken place; because, in order to constitute a legal assignment of a debt, notice must be given to the debtor, otherwise no legal interest passes, but the debt, and the instrument which is the evidence of it, remain in the original creditor; and if he become bankrupt, it passes to his assignees, as having been in his order and disposition at the time of the bankruptcy, within the meaning of the 6 Geo. 4, c. 16, s. 72. This policy is a chose in action, and is a chattel within the meaning of that section. In the present case, no notice was given to the Assurance Company of the transfer to the defendants, and consequently no interest in the policy passed to them, but it remained

in the order and disposition of the bankrupt, and vested on the bankruptcy in his assignees. The defendants, therefore, have no lien on the instrument as against the assignees: *Ryall v. Rowles* (a). The object of giving notice to the debtor is to vest the debt in the assignee, and to prevent the debtor from paying it to the original creditor. Without such notice, the Assurance Company might consider the bankrupt as still continuing the owner of the policy, and might, by paying him a sum of money, obtain a release from their covenants under it. Notice is necessary in the case of a bond, and on the same principle must be held necessary in the case of a debt payable on a contingency. *Ex parte Burton* (b), *Ex parte Monro* (c), *Buck v. Lee* (d), *Dean v. James* (e). [*Parke, B.*—Those were cases of assignment; here the defendants contemplated nothing more than the obtaining a deposit of the instrument, as a security for their advances. An insurance broker has a lien on the policy, without any notice to the underwriters. I am not aware of any authority to shew that trover can be maintained in a case like this. Then the 72nd section of the Bankrupt Act does not apply, for the bankrupt certainly had not the order and disposition of the policy with the consent of the true owner, within the meaning of that section.] The benefit of the covenant remains to the bankrupt, until notice be given to the covenantor; therefore the right to recover upon it vests in his assignees, and the instrument which is the evidence of that right also passes to them. If the life had fallen, the bankrupt could have compelled the insurers, in equity, to pay him the amount of the insurance.

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R. V. Richards, contra.—This clearly is not an instru-

(a) 1 Ves. sen. 348.

(b) 1 Glyn. & J. 207.

(c) *Buck's Cases in Bankruptcy*,
300.

(d) 1 Ad. & E. 805; 3 Nev. &
M. 580.

(e) 1 Ad. & E. 809, n.; 1 Nev.
& M. 392.

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ment which remained in the order and disposition of the bankrupt at the time of the bankruptcy, with the consent of the true owner, unless at least it be made out that the defendants were the *true owners* by reason of the deposit with them. If the debt be distinguished from the paper writing, that has been in the order and disposition of the defendants, not of the bankrupt: but at law the debt does not pass at all. The defendants never could recover upon the policy except in the name of the bankrupt; which shews that at law the bankrupt continues the owner. Ship policies are almost always pledged with the broker; and it has been held that in such case they are not in the order and disposition of the bankrupt assured, although there have been no notice to the underwriters (a). In order to maintain trover for this instrument, the plaintiffs must shew that the *policy* is the *debt*. The defendants' holding the policy will not prevent the assignees from receiving the debt; it is no more than evidence of the debt, and they may recover by giving secondary evidence of its contents. [Parke, B.—In *Hunter v. Leathley* (b), it was held that an insurance broker, who has a lien on the policy for his premiums, is compellable by the assured to produce it on the trial of an action against the underwriters, and is a competent witness, notwithstanding his lien, to prove all matters connected with it.] If that principle be applicable here, no harm can possibly accrue to the assignees from the defendants retaining possession of the document; but at all events, they can give evidence of its contents. This case has been treated throughout the argument for the plaintiffs as if it were an action for the debt, instead of trover for the *paper*: the *contract* has been confounded with the *security*. In the cases cited on the other side, the debt had been actually assigned; but here there is no assign-

(a) *Falkener v. Case*, cited in *Lempriere v. Pasley*, 2 T. R. 491.

(b) 10 B. & C. 858.

ment, nor even any agreement for an assignment of the debt: the defendants have nothing but a right to hold the policy, which is the evidence of the contingent contract, as a security for their advances.

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But even if it be held that there has been an assignment of the debt, yet the plaintiffs cannot recover the policy in trover, without first paying or tendering the amount of the premiums paid by the defendants, the payment of which was essential for keeping alive the claim against the insurers. If, after the life dropped, the plaintiffs sued the defendants for the insurance money, they could only recover the amount minus the premiums: *Schondler v. Wace (a)*. [*Alderson, B.*—Can you raise this point? It is not expressly stated in the case that the amount of the *premiums* has not been tendered.] It was for the plaintiffs to shew a tender; the affirmative of the issue was upon them; and it cannot be necessary to insert a negative in a special case.

Kelly, in reply.—No point was made at the trial, or is raised upon the case, as to the want of a tender of the premiums. [The Court suggested that the plaintiffs should have the liberty of still repaying the premiums, and *Kelly* undertook that they should be paid on the delivering up of the policy, in case the judgment of the Court should be in favour of the plaintiffs.] Then, as to the main point of the case. The difficulty arises from this being inaccurately termed a *debt*; it is properly a *covenant*, a chose in action, which at the time of the bankruptcy was a chattel interest in the bankrupt, and of actual saleable value. Undoubtedly a covenant cannot be assigned at law; it is said also that there is no complete assignment in equity without notice to the covenantor, and therefore the assignee does not become the true owner within the statute. But all the cases in equity go to shew that under such an imperfect assignment, the assignee is the true owner within the

(a) 1 Campb. 487.

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meaning of the Bankrupt Act, and that in this respect there is no distinction between a deposit by way of pledge, and an actual assignment. The former is, in equity, an assignment of the interest pledged, entitling the assignee to hold it, not absolutely, but as a security for some smaller interest. This principle was recognised in *Ex parte Waithman* (a). That was the case of a mere deposit of a policy with a banker by way of security; but no doubt was suggested that the interest would pass to the assignees, unless notice were given in due time to the insurers: it was assumed that a deposit was in this respect on the same footing with an assignment. So in *Ex parte Carbis* (b), the only question was, whether sufficient notice had been given to the Assurance-office: but the case recognises the doctrine that the statute applies not only to debts, but to policies of assurance. Then, if the benefit of the covenant passed, the instrument in which alone it is contained, and which is the thing itself whereby the right is created, must pass also. The policy is not only the best evidence of the right, but it in fact constitutes the right. The whole must be treated as one right, and all that is incidental to it must pass together. The object of the Bankrupt Act was to defeat transactions of this nature, and to vest in the assignees every thing of value so left in the order and disposition of the bankrupt, whereby he has been enabled to obtain a credit which was not fairly due to him. That object can only be effectuated by passing, with the right or contract, the instrument also without which it cannot be enforced.

Cur. adv. vult.

The judgment of the Court was now delivered by

LORD ABINGER, C. B.—This was a special case argued

(a) 4 Dea. & C. 412.

(b) Id. 354.

during the present Term. The case turned upon this point, whether the assignees of a bankrupt were entitled to recover in trover the possession of a policy deposited by the bankrupt with the defendants: and the question to be determined is, whether that deposit was intended as a lien, or whether it was intended to be an assignment of the claim which the bankrupt had on the policy. In which of these two points of view the act of the bankrupt was to be regarded, was left uncertain in the statement of the case; and we apprehend that the assignees were bound to make that clear one way or the other. If they meant to rely upon its being a perfect assignment, and therefore constituting the defendants the true owners, so that the policy remained in the order and disposition of the bankrupt, they should have made that clear upon the case stated, that we might have acted upon it; but as they have stated the facts, we are at liberty to conclude that nothing more was intended than to give a mere lien by the deposit of the policy, and not to confer an equitable right to the defendants to receive the money; in other words, that it was merely intended as a mode of preventing the bankrupt from receiving it, without notice to the parties with whom he had so deposited the policy. Now if that were the case, as we think, upon the facts as stated, it must be taken to be, then we are of opinion that the plaintiffs are not entitled to recover. Various cases have been decided in equity, the authority of which we do not dispute, and which shew that where an equitable assignment of an interest has been contemplated, but there has been no notice to the debtor, the instrument is supposed to remain in the hands of the party making such equitable assignment. The present case does not at all contradict those cases, but is consistent with them. Suppose there had been an assignment in writing of this policy, to secure the debt, but no notice given to the office, then it would fall within several of the cases, and particularly those decided before the Vice-Chancellor,

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and reported in 2nd Simons (*a*), that there had been no equitable transfer, because it was not completed, and that the instrument remained in the possession of the bankrupt notwithstanding the intended transfer; and if it was not complete in equity, then the assignees would not be divested of their right to recover. But in the case of a mere lien from a deposit by the bankrupt, I believe there is no example of the assignees having been held entitled to maintain trover. Our decision in this case will not affect the title of the assignees, who have claimed the debt; they may still give a discharge to the office for the debt due upon the policy, to which the bankrupt was entitled, and inasmuch as there was no legal assignment of the policy. But the lien upon the policy remains unaffected by the bankruptcy; and therefore we think that the defendants are entitled to judgment.

Judgment for the defendants.

(*a*) *Williams v. Thorp*, 2 Sim. 257; *Ex parte Colville*, Id. 570, n.

WHEELER v. SENIOR.

Feb. 1.

Declaration in assumpsit by drawer against acceptor of a bill of exchange for 728*l.* 6*s.*, dated 15th of February, 1840, payable three months after date. Plea, as to 609*l.* 10*s.*,

parcel of the monies in that count mentioned, that after the acceptance of the bill in that count mentioned, the defendant paid to the plaintiff the sum of £700 in full satisfaction and discharge of (inter alia) the sum of 609*l.* 10*s.*, parcel of certain monies mentioned and specified in a certain bill of exchange, bearing date 15th of February, 1840, and drawn by the plaintiff upon and accepted by the defendant, and that the plaintiff accepted and received the said sum of money in such full satisfaction and discharge: and that the bill of exchange in the count mentioned was and is the same identical bill as that in the plea mentioned, in respect whereof the said payment was so made, and not any other or different bill. Replication, that the bill in the count mentioned was not nor is the same identical bill as that in the plea mentioned, &c., &c.: concluding to the country:—*Held* bad on special demurrer.

sons, who would have presented it to the defendant for payment on the day when it became due, but that the defendant, in consideration of the plaintiff's procuring the possession of the bill, and preventing it from being so presented, agreed to remit the amount thereof to the plaintiff on the Wednesday after the bill should become due: and alleged as a breach, that the defendant did not remit the amount of the said bill on the said Wednesday, or at any other time.

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Plea to the second count, so far as related to the sum of 609*l.* 10*s.*, parcel of the monies in that count mentioned, that after the acceptance of the said bill of exchange in that count mentioned, and before the commencement of this suit, to wit, on the 18th day of April, 1840, the defendant paid to the plaintiff a large sum of money, to wit, the sum of £700, in full satisfaction and discharge (amongst other things) of the sum of 609*l.* 10*s.*, parcel of certain monies mentioned and specified in a certain bill of exchange, bearing date the 15th day of February, 1840, and then, to wit, on the day and year last aforesaid, drawn by the plaintiff upon and accepted by the defendant; and that the plaintiff then accepted and received the said payment in such full satisfaction and discharge as aforesaid: and that the said bill of exchange in the said second count mentioned was and is the same identical bill of exchange as the bill of exchange hereinbefore mentioned, in respect whereof the said payment was so made as aforesaid, and not any other or different bill of exchange. Verification.—A plea in the same terms was also pleaded to the third count.

Replication, that the said bill of exchange in the second count mentioned was not nor is the same identical bill of exchange as the bill of exchange in the second plea mentioned, and in respect whereof the said payment was so made as in that plea mentioned, in manner and form &c.: concluding to the country.—The same replication was pleaded to the third plea.

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The defendant demurred specially to each of these replications, assigning for causes, that the replication does not state how or in what manner the bill of exchange in the second count mentioned is a different bill of exchange from that mentioned in the plea; and for that the replication admits the existence of the bill in the plea mentioned, bearing date the same day and year as the day and year on which the bill in the second count mentioned is therein alleged to have been made, and also admits that the payment mentioned in the plea was made by the defendant in the manner therein alleged, and yet does not distinctly shew any other bill than that in the plea mentioned, as the bill mentioned and declared on in the second count of the declaration; and also for that the replication does not, as it ought to do, conclude with a verification, but tenders an issue to the country, and thereby precludes the defendant from making any answer to the bill of exchange in the second count mentioned; and for that, inasmuch as it appears from the pleadings that there were two bills of exchange, bearing date the same day and year, whereby the defendant supposed that the bill mentioned in the second count was the bill upon which the payment mentioned in the plea was made as therein mentioned, the plaintiff ought, by the rules of pleading, to have new assigned, and shewn distinctly what was the bill of exchange in respect whereof such payment was so made, and in what respects the bill in the second count differs therefrom, by which means the defendant would have had the opportunity of pleading to the last-mentioned bill, from which he is wholly precluded by the form of the replication, &c., &c.—Joinder in demurrer.

The points marked for argument on the part of the plaintiff were, that the pleas were bad, as they did not state that the payment therein mentioned was made or received in satisfaction of the damages, but merely of the principal sum, and that the plaintiff remained unan-

swered as to his damages as to that sum; and the payment and receipt in satisfaction of a sum of money, was no answer to the plaintiff's demand for damages for non-payment of that sum.

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The case was argued on a former day in this term (Jan. 18), by

Crompton in support of the demurrer.—The first question is, whether the replications are good. There are undoubtedly cases in which it has been decided that a plaintiff need not new assign upon an ordinary plea of payment: *Freeman v. Crafts* (a), *James v. Lingham* (b), *Alston v. Mills* (c); but that is because of the generality of the plea: but it is different where the defendant alleges that he has paid a sum of money, and also that a bill of exchange in respect of which the payment was made, is the same bill as that declared on. It is like the case of two assaults, in which case the plaintiff must new assign. Here the replication admits the existence of two bills, and a payment in respect of one of them, but denies that the bill in respect of which the payment was made was the bill declared on; and the defendant has no opportunity of answering that statement. It is quite unprecedented to traverse the allegation of *quæ est eadem*. Suppose there were two bills of the same tenor, date, and sum, and one had been paid and the other released; and one of them being sued on, the defendant pleads payment, and the plaintiff in his replication denies that the bill paid was the same bill as that declared on; at the trial he may produce and prove the other bill, in respect of which the release was given, and so the defendant would lose the advantage of his defence to both. That would be most unjust. The plaintiff, therefore, ought to have given the

(a) 4 M. & W. 4.

(b) 5 Bing. N. C. 553; 7 Scott, 603.

(c) 9 Ad. & E. 249; 1 Per. & D. 197.

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defendant an opportunity of answering the statement of the replication. *Heydon v. Thompson* (a) is in point. There, to a declaration by indorsee against acceptor of a bill, the defendant pleaded facts shewing that it was a qualified acceptance, without consideration, for the accommodation of the drawer, who had indorsed the bill to the plaintiff with notice of these facts, and without consideration. The plaintiff new assigned, that the bill pleaded was not the same bill as that declared on, but another, for that the bill declared on was accepted generally, and the defendant never accepted it in any qualified manner. The defendant again pleaded, setting out a qualified acceptance as before, and re-stating similar facts as in the plea to the declaration, as to a bill which he stated to be the bill newly assigned. The plaintiff replied, that the bill mentioned in the last plea was not the bill newly assigned, but another and different; and this replication was held bad on demurrer, for concluding to the country, and not with a verification. *Patteson, J.*, there says—"By stating that the bill of exchange mentioned in the plea was not the same as that first described in the declaration, he [the plaintiff] acknowledged the existence of the second bill, and therefore his replication should have concluded with an averment, so as to give the defendant an opportunity of answering what was said of the bill so admitted to be in existence."

Secondly, the pleas are good. The objection taken to them is, that they ought to have been pleaded to the damages as well as to the sum. If there is any thing to which the defendant has not pleaded, and which is not covered by his other pleas, the plaintiff may sign judgment; but that is not ground of general demurrer. A plea to the sum of money is in substance a plea to all the damages in respect of that sum.

(a) 1 Ad. & E. 210; 3 Nev. & M. 319.

Whitehurst, contra.—It is admitted on the other side, *Exch. of Pleas*, 1841. *WHEELER v. SENIOR.* that if this were a general plea of accord and satisfaction, the defendant must have proved a payment in discharge of the specific bill declared on; and what difference can it make, that he has chosen, in his plea, specifically to apply the payment to the bill declared on, by the introduction of the *quæ est eadem*? [*Parke*, B.—I suppose the defendant will say the *quæ est eadem* might have been left out.] Without that allegation it is no plea at all, there being nothing to point it to the claim which is the subject of the action; and the plaintiff was bound to take issue on that allegation, or he could not have answered the defendant's traverse: *Com. Dig. Pleader* (E. 31). The Court will not encourage the increase of new assignments, which are in general mere useless form, as the defendant almost always knows what he has really to answer. It is said that on this record the plaintiff may foist upon the defendant, at the trial, a different bill; but so he might if he had taken issue on an ordinary plea of payment. The plaintiff, by new assigning, would have admitted the existence of a bill in the same terms as that declared on, of the same date, and between the same parties, and must have said that he was suing in respect of another of precisely the same tenor; then, if the defendant pleaded payment, the plaintiff would be bound to prove two bills of the same tenor, which it is manifest do not exist, and therefore he would be defeated. The proper course is to take issue on the replication, and it will then be a question to be left to the jury, whether there are two different debts or not: *Hall v. Middleton* (a).—He also cited *Hill v. White* (b).

Secondly, the plea is bad, inasmuch as it contains no answer to the plaintiff's claim for damages in respect of the non-payment of the 609*l.* 10*s.*, to which it is pleaded. This is an action of *assumpsit*, in which the plaintiff does

(a) 4 Ad. & E. 107; 5 Nev. & M. 410.

(b) 6 Bing. N. C. 23; 8 Scott, 249.

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The proper form would have been to plead, as to the breach of promise as to 609*l.* 10*s.*, parcel, &c., and the damages resulting therefrom, that the defendant paid, &c. &c. In an action for the non-delivery of a horse pursuant to contract, it would be no plea, that after breach the defendant paid the plaintiff the value of the horse, unless he also averred that he had paid something by way of damages for the breach of contract: *Francis v. Cryswell* (a), *Perry v. Odingwell* (b), *Corbett v. Swinburne* (c). [*Parke, B.*—To make this a good plea to the second count, as to the 609*l.* 10*s.*, parcel of the 728*l.* 6*s.*, the amount of the bill mentioned in that count, it ought to shew that the payment was made on or before the day when the bill became due, or that, if made on a subsequent day, it was received together with some further sum for interest; otherwise what answer is given as to the claim for interest on that amount? Suppose judgment had been allowed to go by default in the terms of this plea; how much could the plaintiff have recovered? The defendant must therefore contend that it is a plea, not in satisfaction of part of the monies mentioned in the count, but of the damages also. Lord Abinger, C. B.—It is no satisfaction of the interest, but it is a satisfaction, pro tanto, of the claim which is made up of the 728*l.* 6*s.*, and the interest. The defendant only seeks to diminish the claim for debt and damages by the sum of 609*l.* 10*s.* *Parke, B.*—The goodness or badness of the plea depends upon this, whether it is meant to be applied in bar of so much of the *damages* in the second count as amounts to 609*l.* 10*s.*, or of so much of the *bill*.]

Crompton, in reply.—The plea goes to so much of the damages. Under the new rules, the plea is necessarily pleaded

(a) 5 B. & Ald. 886.

(b) 4 Mod. 250.

(c) 3 Nev. & P. 551; 8 Ad. & Ell. 673.

in reduction of damages. At all events, it is sufficient on general demurrer. The replication is bad, and contrary to all authority. The traverse in effect admits another bill in respect of which the payment was made: if so, the plaintiff ought to give the defendant an opportunity of answering as to one. The replication introduces new matter, viz. the existence of a second bill, and yet does not conclude with a verification. The plaintiff might have obviated the whole difficulty by introducing two counts into his declaration; or he might safely reply, denying that the defendant has paid the bill mentioned in the declaration.

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Cur. adv. vult.

The judgment of the Court was now delivered by

LORD ABINGER, C. B.—This was the case of a demurrer to a replication, on the ground that the plaintiff, having brought his action on one bill of exchange, and by the form of his pleading admitted the payment by the defendant of a bill drawn and accepted by the same parties, and of the same date, as the bill declared on, ought to have gone on to new assign, and so given the defendant an opportunity of pleading to the other bill. The Court entertained considerable doubt upon the point; and I should have been better satisfied if the authorities had permitted us to hold the replication sufficient; because, if there were a new assignment, the defendant might plead again the same plea as is here pleaded, and so on ad infinitum. But it appears to the Court that we are fettered by the decisions, and that the case of *Heydon v. Thompson* is not substantially distinguishable from the present, and compels us to say that this replication is bad. The plaintiff may amend on payment of costs, and may, if he pleases, demur specially to the plea.

Leave to amend accordingly.

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jurisdiction of the Court, or to order a commission to issue for the examination of witnesses on oath at any place out of the jurisdiction. By the former act, the Crown was bound only in relation to the criminal cases therein mentioned; by the latter, the Crown, if bound at all, is so only with reference to the like criminal cases, when the offence is committed in any of the foreign possessions of the Crown other than India. This is a civil and not a criminal proceeding, and the only course is to file a bill in equity: *Bonham v. Leigh* (a). The only instance in the books of an application at all like the present is that of *The Attorney General v. Laragoity* (b), but that was on the equity side of the Court, and the commission was granted upon a bill filed. There is, indeed, a MS. case in the office, *R. v. Arthur*, in which a commission was granted on this side of the Court, but the depositions, when tendered in evidence, were rejected.

Wightman, contra.—The conjoint effect of the 13 Geo. 3, c. 63, and 1 Will. 4, c. 22, is to empower the Court to issue a mandamus in this action, although it is a proceeding at the suit of the Crown. The Crown was clearly bound to a certain extent by the 13 Geo. 3, c. 63, s. 40; and the 1 Will. 4, c. 22, s. 1, extends “all and every the powers, authorities, provisions, and matters” contained in the former act, one of which did bind the Crown, to all colonies and places under the dominion of the Crown in foreign parts, and to “all actions depending in any of the Courts of law at Westminster.” This language is sufficiently comprehensive to include the case of an action at the suit of the Crown. A scire facias by the Crown, to enforce the payment of a bond, may be considered as an *action*, within the terms of a remedial statute. If however the Court are of opinion that such is not the effect of the statutes, they may

(a) 5 Price, 444.

(b) 3 Price, 221.

PER CURIAM.—Where a cause is sent down to a new trial ex debito justitiæ, and not by the discretion of the Court, it is open on the whole record. This case falls, therefore, within the general rule on this subject, and the rule must be absolute on payment of costs.

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Rule absolute accordingly.

REGINA v. WOOD and Others.

THIS was a scire facias upon a bond given by the defendant, conditioned for the due exportation of a quantity of hops. *Wightman*, for the defendants, had obtained a rule, calling upon the Attorney General to shew cause why a commission should not issue for the examination of a witness in India.

Feb. 1.

In an action at the suit of the Crown, the Court has no power, under the 1 Will. 4, c. 22, at the defendant's instance, to direct a commission for the examination of witnesses.

Jervis now shewed cause.—This application is without precedent, and cannot be supported. The stat. 13 Geo. 3, c. 63, ss. 40—44, authorizes the issuing of a mandamus for the examination of witnesses in India, in the case of indictments or informations exhibited in the Court of King's Bench for misdemeanors or offences committed in India, and also in actions at law or suits in equity commenced or prosecuted by the East India Company, or by other persons, for causes of action arising in India. The stat. 1 Will. 4, c. 22, s. 1, extends the provisions of the 13 Geo. 3, c. 63, to all the foreign possessions of the Crown, and also to all actions depending in the superior Courts at Westminster, in whatever county the cause of action may have arisen, and whether within the jurisdiction of the Court to the Judges whereof the commission may be directed, or not. And s. 4 empowers the superior Courts to order the examination upon oath, on interrogatories or otherwise, before the Master, of any witness within the

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jurisdiction of the Court, or to order a commission to issue for the examination of witnesses on oath at any place out of the jurisdiction. By the former act, the Crown was bound only in relation to the criminal cases therein mentioned; by the latter, the Crown, if bound at all, is so only with reference to the like criminal cases, when the offence is committed in any of the foreign possessions of the Crown other than India. This is a civil and not a criminal proceeding, and the only course is to file a bill in equity: *Bonham v. Leigh* (a). The only instance in the books of an application at all like the present is that of *The Attorney General v. Laragoity* (b), but that was on the equity side of the Court, and the commission was granted upon a bill filed. There is, indeed, a MS. case in the office, *R. v. Arthur*, in which a commission was granted on this side of the Court, but the depositions, when tendered in evidence, were rejected.

Wightman, contra.—The conjoint effect of the 13 Geo. 3, c. 63, and 1 Will. 4, c. 22, is to empower the Court to issue a mandamus in this action, although it is a proceeding at the suit of the Crown. The Crown was clearly bound to a certain extent by the 13 Geo. 3, c. 63, s. 40; and the 1 Will. 4, c. 22, s. 1, extends “all and every the powers, authorities, provisions, and matters” contained in the former act, one of which did bind the Crown, to all colonies and places under the dominion of the Crown in foreign parts, and to “all actions depending in any of the Courts of law at Westminster.” This language is sufficiently comprehensive to include the case of an action at the suit of the Crown. A scire facias by the Crown, to enforce the payment of a bond, may be considered as an *action*, within the terms of a remedial statute. If however the Court are of opinion that such is not the effect of the statutes, they may

(a) 5 Price, 444.

(b) 3 Price, 221.

mould the rule, and direct a stay of proceedings unless the Crown will consent to a commission ; since otherwise there will be a failure of justice.

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LORD ABINGER, C. B.—I think this application cannot be granted. The words of the 1 Will. 4, c. 22, as to actions, cannot apply to actions at the suit of the Crown ; the Crown is not bound unless specially named. Then the incorporation of the provisions of the 13 Geo. 3, c. 78, cannot amount to more than if those provisions had been enacted *de novo* ; and by them the Crown is bound only as to indictments and informations.

PARKE, B.—There are no fewer than four decided objections to this application, on the face of the act of Parliament. In the first place, upon the preamble, so much only of the 13 Geo. 3 as relates to *actions* is incorporated in the act ; secondly, even supposing that the clause relating to indictments and informations is imported into it, that only gives a *mandamus* ; thirdly, they must be indictments or informations for misdemeanours or offences committed abroad ; and fourthly, the clause applies only to indictments and informations exhibited in the King's Bench.

ALDERSON, B., and GURNEY, B., concurred.

Rule discharged.

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The Sheffield and Manchester Railway Act, (7 Will. 4, c. xxi), by s. 115, empowered the directors from

time to time to make such calls from the proprietors, on their respective shares, as they from time to time should find necessary, so that no call should exceed £10 on each share, and that there should be an interval of three calendar months between each successive call, and twenty-one days' notice should be given of every such call by advertisement in the local newspapers; and the proprietors were thereby required to pay the calls on their shares to such person, at such time, at such place, and in such manner, as the directors should from time to time direct or appoint. The directors made a resolution for a call, specifying therein the amount of the call, and the day of payment, but not the place where, or the person to whom, the payment was to be made; but a notice of that call, subsequently inserted in the local newspapers, according to the directions of the act, specified all those matters. In an action for the amount of such call against a party who was a proprietor at the date of the resolution, of the notice, and of the day appointed for payment, it not appearing also that there was any change in the directory during that interval:—*Held*, that the call was properly made.

By another resolution, made on the 13th of March, the directors resolved that a call of £5 should be made on the 30th of March instant, to be paid on the 1st of May:—*Held*, that the call was not invalid because the resolution was prospective.

Some of the directors by whom the resolutions for the calls were made, were members of a banking company, who were the bankers and treasurers of the Railway Company, and as such received and gave receipts for calls, and paid cheques drawn by the directors, &c. A clause of the act of Parliament (s. 150) enacted, that no person concerned or interested in any contract with the Company should be capable of being chosen a director, and that if any director should directly or indirectly be concerned in any contract with the Company, he should thereupon be immediately, and was thereby, discharged from the direction:—*Held*, that this clause applied only to contracts made with the Company in prosecution of its enterprise, and did not disqualify the directors above mentioned.

Another clause (s. 159) directed that the orders and proceedings of the directors should be entered in a book, and signed by the chairman of the meeting, and enacted, that when so entered and signed, they should be deemed originals, and be read in evidence without proof of the persons making or entering them being directors, or of the signature of the chairman:—*Held*, that a book of proceedings, purporting to be signed "W. S., deputy chairman," was evidence per se, without proof that W. S. was in fact deputy chairman, or as such presided at the meeting.

A transfer of railway shares from an original subscriber to the undertaking, made before the formation of a register of proprietors pursuant to the act, but after the passing of the act of Parliament, is good, although the transferee be never registered as a proprietor.

Where the act required such transfer to be by deed, and a transfer of shares was executed by the seller with a blank for the purchaser's name, and stating the consideration untruly, but the purchaser afterwards signed and transmitted to the Company, in pursuance of the act, a proxy paper describing him as the proprietor of the shares:—*Held*, in an action by the Company against him for calls on such shares, that he was precluded from disputing the validity of the transfer.

(a) The following sections of the act (which received the royal assent 5th May, 1837) were referred to in the course of the argument, and are material to the case:—

Sect. 110. The said Company shall and they are hereby required from time to time, as occasion may require, to cause the names of the several corporations and the names

several times of the making of the several calls thereafter mentioned, and from thence continually to the commencement of this suit, a proprietor of twenty shares in the said undertaking, and to be indebted to the Company in the

and additions of the several persons who shall then be or who shall from time to time thereafter become entitled to shares in the capital stock of the said Company, with the number of shares they are respectively entitled to, and the amount of the subscriptions paid thereon, and also the proper number by which every share shall be distinguished as aforesaid, to be fairly and distinctly entered in a book to be kept by the clerk of the said Company, and after such entry made, to cause their common seal to be affixed thereto; and the said Company shall from time to time cause a certificate or ticket, with their common seal affixed thereto, to be delivered to every such proprietor, on demand, specifying the share or shares to which such proprietor is entitled, such proprietor paying to the clerk of the said Company the sum of two shillings and sixpence, and no more, for every such certificate or ticket; and such certificate or ticket shall be admitted in all courts whatsoever, as *prima facie* evidence of the title of such respective proprietors, their successors, executors, administrators, or assigns, to the share or shares therein specified; and such certificate or ticket may be in the words or to the effect following; that is to say,

‘Sheffield, Ashton-under-Lyne, and Manchester Railway Company.

‘Number

‘These are to certify that A. B., of [or the name of the cor-

poration] is the proprietor of the share [or shares], number of the Sheffield, Ashton-under-Lyne, and Manchester Railway Company, subject to the rules, regulations, and orders of the said Company. Given under the common seal of the said Company the day of in the year of our Lord .’

Sect. 113. The several persons who have subscribed, or who shall hereafter subscribe or agree to advance or pay any money for or towards the said undertaking, shall and they are hereby required to pay the respective sums of money by them respectively subscribed or agreed to be paid, or such parts or proportions thereof as shall from time to time be called for by the directors of the said Company, under or by virtue of the powers of this act, at such times and places and to such persons as shall from time to time be directed by the said Directors; and in case any party shall refuse or neglect to pay as aforesaid the money by him so subscribed for, or the part thereof so called for, at the time or respective times and in the manner required for that purpose, it shall be lawful for the said Company to sue for and recover the same, with full costs of suit, in any court of law or equity, together with interest on every such unpaid sum of money at the rate of 5*l*. per centum from the time when the same was directed to be paid as aforesaid up

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sum of £450 for four calls of 2*l.* 10*s.*, £5, £5, and £10 respectively. The defendant pleaded, first, non assumpsit; secondly, that at the time of making the calls in the declaration mentioned, he the defendant was not a proprietor

to the day of the actual payment thereof.

Sect. 115. The directors of the said Company shall have power from time to time to make such calls of money from the proprietors of shares in the capital stock of the said Company who shall not have already paid the full amount due or payable in respect of their respective shares, to defray the expense of the said railway and carry on the same, as they from time to time shall find necessary, so that no such call shall at any one time exceed the sum of ten pounds upon each share which any person or corporation shall be possessed of or entitled unto in the said undertaking, and that there shall be an interval of three calendar months at the least between each successive call, and twenty-one days' notice at the least shall be given of every such call by advertisement in one or more newspaper or newspapers published or circulated in each of the counties of York, Derby, Chester, and Lancaster; and the several proprietors of shares in the capital stock of the Company shall and they are hereby required to pay the sum or sums of money subscribed for or payable in respect or on account of their several and respective shares, or so much thereof as shall not have been previously paid up by such calls or instalments, to such person, at such time, at such place, and in such

manner as the directors of the said Company shall from time to time direct or appoint, for the use of the said undertaking; and if any proprietor of any such share shall not from time to time pay the rateable proportion or call or instalment due in respect of each such share to the person and at the time and place and in the manner to be appointed for payment thereof as herein-before mentioned, then and in such case and so often as the same shall happen, such proprietor shall pay interest for the amount which shall be so unpaid after the rate of 5*l.* per centum per annum from the day appointed for the payment thereof up to the time when the same shall be actually paid: Provided, that no proprietor of any share in the capital stock of the said Company shall, under the authority of this act, be called upon or be liable to pay any greater sum of money than with the principal money already paid on account of the subscription for such shares will amount to the sum of £100 in respect of each such share, over and besides any interest paid or payable by reason of default in payment of calls as aforesaid.

Sect. 118. In any action to be brought by the said Company against any proprietor of any share in the said undertaking to recover any money due and payable to such Company for or by reason of any call made by virtue of this act,

of the said shares in the said undertaking in the declaration mentioned, modo et formâ:—on which issues were joined.

At the trial before *Rolfe, B.*, at the last Liverpool Assizes,

it shall be sufficient for the said Company to declare and allege that the defendant, being a proprietor of a share in the said undertaking, is indebted to the said Company in a certain sum of money, being the same sum or thereabouts as the calls unpaid shall amount to, for so many calls of such sums of money upon such share or so many shares belonging to the defendant, whereby an action hath accrued to the said Company by virtue of this act, without setting forth the special matter; and on the trial of such action it shall only be necessary to prove that the defendant at the time of making such respective calls was a proprietor of a share or shares in the said undertaking as such action is brought in respect of, or some one such share, and that such notice was given as is directed by this act of such calls having been made, without proving the appointment of the directors who made such respective calls, or any other matter or thing whatsoever; and the said Company shall thereupon be entitled to recover what shall appear due (including interest computed as aforesaid) on such calls, unless it shall appear that any such call exceed ten pounds for every share, and was made within the distance of three calendar months from the last preceding call; and in order to prove that the defendant was a proprietor of such alleged

shares, the production of the book in which the said Company is by this act directed to enter and keep the names and additions of the several proprietors of shares in the said undertaking, with the number of shares they are respectively entitled to hold, and of the several persons and corporations who shall from time to time become proprietors thereof or be entitled to shares therein, shall be *primâ facie* evidence that such defendant is a proprietor, and of the number and amount of his shares therein, provided that the name of the defendant in the record substantially agrees with that in such book; and in order to prove that such notice was given as aforesaid, the production of such newspapers as aforesaid, containing such advertisement as by this act required, shall be *primâ facie* evidence that such advertisements were duly inserted in such newspapers, and that such newspapers were printed and published respectively at the respective times they bear date, and by such printer, or printer and publisher, and at such places and by such persons respectively as they purport to be printed, or printed and published, by and at respectively.

Sect. 125. It shall be lawful for the several *proprietors* of shares in the said undertaking, and their respective executors, administrators, and successors, by writing duly stamped, in which the consider-

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it appeared that the first general meeting of the Company, pursuant to the 142nd section of the act of Parliament, was held on the 27th of October 1837, when sixteen directors were elected, of whom thirteen were among those

ation for the same shall be duly stated, to sell and dispose of any share or shares to which they shall respectively be entitled therein, subject to the rules and conditions in this act mentioned; and the form of conveyance of such share or shares may be in the following words or to the like effect, varying the names and descriptions of the contracting parties as the case may require; that is to say,

"Sheffield, Ashton-under-Lyne, and Manchester Railway.

"I A. B., of in consideration of the sum of paid to me by C. D., of do hereby assign and transfer to the said C. D., share numbered of and in the undertaking called 'The Sheffield, Ashton-under-Lyne, and Manchester Railway,' to hold unto the said C. D., his executors, administrators, and assigns [or successors and assigns], subject to the several conditions on which I held the same immediately before the execution hereof; and I the said C. D. do hereby agree to accept and take the said share, subject to the conditions aforesaid. As witness our hands and seals this day of in the year of our Lord ."

And in every such sale the *deed or conveyance* (being executed by the seller and purchaser of such share or shares) shall be kept by the clerk of the said Company, &c. &c.

Sect. 127. No person or corpo-

ration shall sell or transfer any share which he or they shall possess in the said undertaking, after any call shall have been made by the said directors for any sum of money in respect of such share, unless he or they, at the time of such sale or transfer, shall have paid the full sum of money which shall have been called for in respect of each share.

Sect. 150. No officer of the said Company receiving a salary, nor any person concerned or interested in any contract with the said Company, shall be capable of being chosen a director of the said Company, nor shall any director be capable of accepting any other office or place of trust or profit under the said Company, or of being concerned or interested in any contract with the said Company during the time he shall be a director of the said Company; and if any director of the said Company shall at any time whilst such director accept or continue to hold any other office or place of trust or profit under the said Company, or if any director, or any secretary, clerk, treasurer, or other officer or servant of the said Company, shall, either directly or indirectly, be concerned in any contract with the said Company, or shall participate in any manner in any work to be done for or goods to be sold to the said Company, every such director, clerk, secretary, treasurer, or other

named as the first directors in the 152nd section of the act. Three of these (one being Mr. William Sidebottom, the deputy chairman) were partners in the Liverpool and Manchester District Banking Company. That Com-

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officer or servant shall thereupon be immediately and is hereby discharged from the direction, office, service, or employ of, in, or under the said Company, and rendered incapable of being thereafter employed by them, unless re-appointed, and such re-appointment be confirmed at some general or special general meeting of the said Company.

Sect. 152 enacts, that sixteen persons therein named, and the survivors and survivor of them, or such of them as shall continue to act, shall be the first directors of the said Company, and shall continue in office until the first general meeting of the said Company to be held in pursuance of this act; and they the said directors hereinbefore named shall and they are hereby required to fix the time and place of such first general meeting within the limit hereinbefore prescribed, and to give notice thereof in the manner hereinbefore directed as to general meetings of the said Company; and until such first general meeting shall be holden, and such directors *shall have been duly elected* as hereinafter prescribed, the said directors hereinbefore named, or the survivors or survivor of them, or such of them as shall continue to act, shall and lawfully may allot the shares (if any) remaining undisposed of in the said undertaking, as they the said directors shall think fit, and shall and may exercise all

other powers and authorities which are by this act given to, or which may be exercised by the directors who may be elected in pursuance hereof at the first or at any subsequent general meeting of the said Company.

Sect. 153 empowers the directors, at their first meeting, and afterwards yearly, to appoint a chairman and deputy chairman.

Sect. 154 provides, that the chairman, or in his absence the deputy chairman, shall preside at all meetings of the Company.

Sect. 159. The orders and proceedings of all meetings, as well general as special general, of the said Company and of the said directors, and of such committees respectively as aforesaid, shall be entered in some book or books to be provided and kept for that purpose, and shall be signed by the chairman of such respective meetings; and such orders and proceedings, when so entered and signed, shall be deemed original orders and proceedings, and shall be allowed to be read in evidence in all courts, and before all judges, justices, and others, and that without proof of such respective meetings having been duly convened, or of the persons making or entering such orders or proceedings being proprietors, or being directors or members of the committees, or of the signature of such chairman, as the case may be, all of which last-mentioned acts shall be presumed.

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pany, ever since the formation of the Railway Company, acted as its bankers and treasurers, having been formally appointed by the directors; and in that capacity they receive calls and give receipts for them, and pay money on cheques signed by the directors, and the clerk and secretary. The Company's seal was not affixed to a register of the proprietors, pursuant to the 110th section of the act, until the month of February 1838. The shares in question were transferred to the defendant by Messrs. Leeds & Son, brokers, of Manchester, in December 1837. Leeds & Son were parties to the subscription deed entered into on the original formation of the Company. The transfer delivered to the defendant with the shares had a blank for the purchaser's name. The consideration was stated in it to be the sum of 18*l.* 15*s.*, or 18*s.* 9*d.* per share; but evidence was given to shew that the sum really paid was £20, *i. e.* £1 per share. The defendant, after receiving this transfer, signed a proxy paper in the form directed by the 120th section of the act, and transmitted it to the secretary; and his name was in consequence entered in the register, on its formation, as the proprietor of the shares in question.

On the 13th March 1839, the directors resolved that a call of 2*l.* 10*s.* per share should be made on the 30th of March then instant, to be paid on the 1st of May following. This was the first call that was the subject of this action. The other three calls were made in pursuance of subsequent resolutions, by which they were expressed to be payable on the 6th of August 1839, the 1st of January 1840, and the 1st of May 1840 respectively. All the resolutions purported to be signed by "William Sidebottom, deputy chairman;" but no evidence was given to shew that in fact Mr. Sidebottom presided as deputy chairman at the several meetings at which the calls were resolved upon. The defendant's counsel objected to the admissibility of the book in which the resolu-

tions were entered, unless such evidence were given: but the learned Judge admitted it. None of the resolutions specified the place where, or the person to whom, payment was to be made: but shortly after the passing of each of the resolutions, notices were inserted in the local newspapers, pursuant to the directions of the act of Parliament, signed, "by order of the directors," by the clerk and secretary, stating, that "the directors having resolved to make a call" for an instalment of — per share, the proprietors were required to pay the said call, on or before &c., to some one of the under-mentioned bankers (amongst others, the Manchester and Liverpool District Bank, Manchester).

Several objections were taken for the defendant at the trial. First, that none of the calls were duly made, inasmuch as the election of directors on the 27th of October 1837 was void, not being made by *registered* proprietors; 2ndly, that the fact of Mr. Sidebottom and the other two directors being also partners in the Bank disqualified them, under the 150th section of the act, from acting, and therefore also the calls were not duly made; 3rdly, that the time and place of payment of the calls ought to have been specified in the resolutions, in order to entitle the Company to recover them; 4thly, that at all events they were not entitled to recover in respect of the first call, for that the resolution to make a call *in futuro* was not valid; 5thly, that the transfer to the defendant, being from parties who were not *registered* proprietors, was void; and lastly, that it was also void for not setting forth the consideration truly. The learned Judge thought that the defendant was precluded from insisting upon either of the two last objections, by reason of his having signed the proxy paper, and so represented himself to the Company as the proprietor of the shares. His Lordship, however, reserved all the points for the consideration of the Court, and a verdict was taken for the plaintiff for the amount claimed.

In Michaelmas Term, *Cresswell* accordingly moved for a

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nonsuit, pursuant to leave reserved, or for a new trial.—First, as to the admissibility of the book in which the resolutions were entered. The 159th section only dispenses with proof of the handwriting, and that the parties signing are directors; but to make the proceedings good, they must be signed by the chairman or deputy chairman, and there was no proof that Mr. Sidebottom was there in the latter capacity. The book is only made evidence *when so signed*. [*Alderson, B.*—I think the act means that the book is to be evidence of every thing on the face of it. *Parke, B.*—The effect is, that it is to be presumed that the signature was that of the individual who was the deputy chairman.]

Secondly, the proceedings were invalid, by reason of some of the directors who were parties to them being also members of the Banking Company. The 150th section expressly enacts, that if any director shall, either directly or indirectly, be concerned in any contract with the Company, he shall ipso facto be discharged from the direction. Here is a loan of money by the Bank to the Company, and therefore a contract with the Company. [*Lord Abinger, C. B.*—The clause clearly applies to contracts with the Company in the execution of its enterprise.]

Thirdly, the transfer to the defendant was void, first, by reason of the purchaser's name being left in blank, and secondly, by reason of the consideration being untruly stated. It is said that the defendant, having afterwards signed a proxy paper describing himself as the proprietor, and delivered it to the Company, is precluded from the benefit of this objection. But the instrument must be a perfect deed at the time of delivery: *Hibblewhite v. M'Morine (a)*. It is clear there could be no estoppel as against the Company, who are no parties to the deed; but estoppels must be mutual. There was no evidence that the Company's position was altered by the act of the defendant. [*Parke, B.*—The defendant held out false colours,

(a) 6 M. & W. 200.

to induce the Company to register him as a proprietor, and therefore to bring this action against him. It is a universal rule of law, that where a party makes a representation to another, whereby the situation of the latter is altered, he is bound thereby.] That principle has never been extended to such a case as this. The Company can have no claim upon the defendant, except in respect of his ownership of the shares. Nor had they any right to allow parties to pretend to transfer shares before a register of the proprietors existed. There is no case in which a different effect has been given to *a deed*, because a party to it has made a statement of his interest under it. This is no *estoppel* in point of law, and could not be so pleaded.

Upon these several points the Court refused a rule, but granted it upon all the other grounds of objection. Against this rule

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Wightman (with whom was Sir *W. W. Follett*) shewed cause in this term (Jan. 13).—First, it was not necessary that the *resolutions* for the calls should specify the place where, and the person to whom they should be paid; that might well be done by the subsequent advertisement. All that is required in terms by the 115th section is, that twenty-one days' notice shall be given of every call by advertisement in the newspapers, and the proprietors are required to pay their calls to such person, at such time and in such manner, as the directors shall *from time to time* direct or appoint. Here the notice, given accordingly by the order of the directors, does specify the persons, and the time and place of payment; and there is nothing to render it necessary that this should be a part of the original resolution. This point has, indeed, already been expressly decided by this Court, in the case of *The Great North of England Railway Company v. Biddulph* (a), where the question was fully argued. The *time* of payment is the only

(a) 7 M. & W. 243.

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material thing for the proprietors to be apprised of in the first instance, and that is specified in the resolution.

Whether the call be considered as being made by the resolution or by the notice, the requisites of the act are complied with by the latter being given in due form, twenty-one days before the time of payment. [*Parke, B.*—The notice in the newspaper, as it seems to me, is the call; it is equivalent to a demand on each proprietor personally, in the terms of that notice. *Alderson, B.*—All that the Company are required, by the 118th section, to prove in an action for calls, is, that the defendant was a proprietor at the time of making the calls, and that notice of the calls was given according to section 115.] It was wholly unnecessary, therefore, for the plaintiffs to have produced the resolution at all.

Another objection is taken to the first call, that the resolution for making it is *prospective*. But the call was in effect made on the 30th of March; and at all events, the proprietors had due notice of it by the advertisement, within the time limited by the act of Parliament.

[With regard to the objection that the directors by whom the call was made were not duly elected, it appeared, on an examination of the Company's books, that at every meeting at which any of the calls in question was made, five at least of the directors named in the 152nd section of the act were present; even, therefore, if the election of directors at the meeting of the 27th of October was invalid, so that the original directors continued in office, the proceedings were good.

And as to the objection that the transfer to the defendant was invalid, being made by subscribers not registered, the judgment of the Court of Exchequer Chamber, in the case of *The Grand Junction Railway Co. v. Freeman*, (delivered this day), in which the like objection was held to be unfounded, was relied on.]

Cresswell, Dundas, Crompton, and Cowling, in support of the rule.—First, as to the sufficiency of the calls generally. The resolution of the directors is itself the call, and ought, therefore, to specify the place and manner of payment. The 115th section requires, first, that a call shall be made by the directors;—that is done by the resolution; and then that there shall be notice of the call having been made, which is given by the advertisement. The notice itself refers to the resolution as the call; it speaks of a call having been theretofore made. If the act had intended the publication in the newspaper to be itself the call, it would have so stated; the words would have been—“shall have power to make such calls, &c., by advertisement in one or more newspapers,” &c. It certainly is at the time of the resolution that the directors “find it necessary” to make the call. The making of the call is that which is the act of the directors, viz. the resolution, of which the proprietors are afterwards advertised by the newspapers. The notice in the newspapers may be given by the clerk, and the two cannot be put together so as to make one valid act; there must be the judgment and discretion of the directors upon the whole. The time and place are matters most material to the proprietors; if the *time* of payment were varied, it would be in effect ordering the payment of a different sum of money; so also, the *place* is to be mentioned as a security to the shareholders, who would otherwise be bound to pay generally. These matters, thus important, cannot be delegated to the clerk. The resolution, therefore, is the call, though it cannot be enforced until notice—as a Judge’s order cannot be enforced until service of it. The 113th section favours this construction; directing that the subscribers shall pay their subscriptions, or such parts of them as shall from time to time be called for by the directors, *i. e.* by their resolution, at such times and places and to such persons as shall from time to time be directed by the directors; and on their

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neglect so to pay, that the Company may sue for and recover the same, with interest from the time when the same was directed to be paid, up to the day of payment. So, section 118 requires that the party sued shall be proved to have been a proprietor at the time of making the calls, *and* that notice was given of the calls having been made: implying that the call and the notice are different things. If the advertisement be the call, it would have been only necessary to say, that it should be sufficient to prove the advertisement, and that the defendant was a proprietor at the time therein mentioned. When does the party become liable to pay,—from the date of the resolution, or of the notice? Again, from what period is he prevented, by the 127th section, from transferring his shares after a call made? Suppose a resolution made on the 1st of August, and advertised on the 20th, can a share be transferred between those days without payment of the call? Again, suppose there were an interval of three months between two successive advertisements, but not between the resolutions; would both the calls be well made? [*Rolfe, B.*—On the other hand, suppose there were a resolution on the 1st of April for a call to be paid on the 1st of July; and on the 2nd of July another resolution for a call to be paid on the 1st of August: that would make two payments within a month. It is quite immaterial to the shareholders when the resolutions are made; not so when the payments are to be made.] The clauses which have been referred to are all in derogation of the common law, and ought to be construed strictly against the Company. The directors do not perform their duty unless they keep a book in which, for the protection of the proprietors, they enter all that they have done, that when they are suing any of the proprietors, they may have regular proceedings to shew against them. If then the resolution be the call, it ought to specify the place and manner of payment. Further, if the advertisement be the call, all is executory

until then; the resolution is only that the directors will thereafter do something, which may be after they go out of office. Surely all must be perfected while the directors who resolved upon the call remain in office.

But to the first call the additional objection applies, that upon the face of the resolution, it only imports that a call shall be made in futuro. Can the directors make a call by resolving that they will do it on a future day? A different class of proprietors may be bound, and a different body of directors may be the parties to make it, who may dissent from the act of their predecessors. Could they resolve that a call should be made at any indefinite distance of time thereafter? [*Alderson, B.*—They may know that debts will fall due on a future day, and find it equally necessary to make a call on that day as in præ-senti.]

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Cur. adv. vult.

The judgment of the Court was now delivered by

PARKER, B.—The only questions which remained for consideration in this case were two. First, whether the resolutions of the directors, that calls should be made, were valid, inasmuch as neither the person to whom, nor the place where, payment should be made, were specified in the resolutions themselves. Secondly, whether a resolution of the directors, that a call should be made at a *future day*, was authorized by the statute, and binding on the proprietors. The first of these objections applied to all the four calls which are the subject of this action, the second to one only.

We think that both these objections are unfounded, and that the plaintiffs are entitled to recover.

The 115th section provides for the making of calls, and is as follows: [His Lordship read it.] There appears to us to be nothing in the 115th section, nor in any other part

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of the act, which requires the directors to fix the person to whom and the place where the payment is to be made, at the same time that they resolve that a call shall be made, and as part of the same resolution. It seems to us to be open to them to fix such person, as well as the time and place of payment, at a different period, and by a distinct act. A question indeed may arise in some cases, where there has been a change of proprietorship by transfer, what is the time of making a call, which fixes the liability of the then proprietor of a share under the 118th section, and which prevents the free transfer of a share under the 127th section; whether it is to date from the original resolution, from the time of fixing the mode of payment, of giving notice in the newspapers, or even from the period when the calls become due. It may be that the resolution of the directors is only an inchoate act, and that the call is not complete until the mode of payment is appointed and notice thereof given; so that no one is liable, unless he be a proprietor when the whole of these circumstances have occurred; and until all these have occurred, a proprietor is not deprived of the right of free transfer. It may be that both the liability to pay the instalment, and the impediment to the transfer, attach from the date of that resolution itself, though the mode of payment be not fixed nor notice given till afterwards: or lastly, it may happen that the term "call" may for one purpose date from the resolution, and for another from a different period. But it is unnecessary in this case to determine this question, for whether the first resolution, or the time of fixing the mode of payment, or of giving the notice, (which is in this instance the same), or even the time fixed for the payment, be the call, this defendant was at each time the proprietor of the shares. All that we have to determine now is, that the directors may fix the time, place, and manner of payment, after the original resolution has been made, and by a distinct act.

It is to be observed that there is no intermediate change of directors between the two acts. It is not proved that those who made the resolution were different directors from those who fixed the mode of payment, and we are not called upon to pronounce any opinion whether such a circumstance would make any difference.

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The second and only remaining question is, whether the resolution to make a call *prospectively* be good. This objection applies to the first call only.

The directors, on the 13th of March, resolve that a call be made *on the 30th of March*, payable on the 1st of May. We think this mode of proceeding is valid. There is certainly nothing in the statute which expressly requires the directors to make the calls *immediately*; and we do not see any reason why they should be so restrained. They may make calls from time to time, as they think fit, when the exigencies of the Company require it, and the nature of the debts and engagements of the Company may well be such, that the amount of the calls would as certainly be wanting at a *future* day, as on the very day when the resolution is made. It is probable that even the inchoate liability to *this* instalment would not attach on any proprietor until the 30th of March, the day as of which the call must, under the resolution, be considered as made, or begun to be made.

The objections therefore cannot prevail; and all the others having been previously disposed of, we have now to pronounce that the rule must be discharged.

Rule discharged.

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VACATION SITTINGS AFTER HILARY TERM.

BARKER and Wife *v.* SMARK.

Feb. 11.

A bond conditioned to secure a principal sum, with interest at 5 per cent. commencing from a previous day, is only liable to stamp duty on the principal sum.

DEBT on a bond dated 10th June, 1840, conditioned for the payment of £3000, with interest at £5 per cent. from the 25th day of March preceding. Plea, *non est factum*. At the trial before *Maule, J.*, at the Dorsetshire Summer Assizes, 1840, the bond, when produced, appeared to be impressed with a £7 stamp. It was objected for the defendant, that the stamp was insufficient under the statute 55 Geo. 3, c. 184, Schedule, Part I, inasmuch as the bond being given to secure not only the principal sum of £3000, but also bygone interest from a previous day, the “definitive and certain sum of money” secured by the bond, at its date, exceeded £3000, and it ought therefore to have borne a stamp of £8. The learned Judge overruled the objection, and the plaintiff had a verdict, leave being reserved to the defendant to move to enter a nonsuit.

In Michaelmas Term, *Bere* obtained a rule nisi accordingly; against which

Cockburn now shewed cause.—The stamp was sufficient. The “definitive and certain sum of money” mentioned in the statute, means the sum certain mentioned in the bond itself as being secured by it, and the stamp is sufficient if it covers that. *Dixon v. Robinson (a)*, *Foreman v. Jeyes (b)*,

(a) 1 M. & Rob. 115; 5 C. & P. 96.

(b) 5 C. & P. 419.

and *Dearden v. Binns* (a), are authorities to shew that the stamp need not have reference to interest accruing *after* the date of the bond. And the same principle of decision applies also to interest secured from a day prior to the date of the bond. When a bond is given for the payment of £100, with interest at £5 per cent., payable in twelve months, it is obvious that in one sense it is given to secure, not £100, but £105, because *id certum est quod certum reddi potest*: yet it is held that in such case the stamp on £100, the amount of the principal money, is sufficient. It is clear that the distinction is taken between a principal sum and the interest upon it—between that part of the sum advanced upon which the profit is to accrue, and the profit so accruing—and that the “sum certain” mentioned in the statute is taken to be the former only, and the latter is not, in whatever shape it be reserved, to be taken into consideration in calculating the amount of the duty. Here the £3000 is the only sum on which interest was to accrue, and the only difference is, that the interest is calculated thereon from a prior date. In *Pruessing v. Ing* (b), *Abbott*, C. J., says—“I am quite satisfied that the words ‘sum of money’ in the act, mean the principal sum mentioned in the note, and not a sum compounded of principal and interest.” [*Parke*, B.—The definition of what is required under the head “Mortgage” favours your argument. There the rule for the calculation of the duty is in these terms:—Where the instrument respectively “shall be made as a security for the payment of any definite and certain sum of money, advanced or lent at the time, or previously due or owing, or forborne to be paid, being payable—not exceeding” &c. &c.]

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Bere, *contra*.—The question is, what is the meaning of the words “definitive and certain sum of money,” in the act of Parliament. The word “principal” is not in the

(a) 1 Man. & R. 130.

(b) 4 B. & Ald. 204.

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act, although, if its effect was to be so limited, nothing would have been easier than to insert it. Here the definitive and certain sum—the amount already ascertained by the efflux of time—due at the date of the execution of the bond, was the principal sum of £3000 plus the quarter's interest which had already accrued. In *Dickson v. Cass* (a), a bond conditioned for securing £1000, with interest and banker's charges of commission, was held to be insufficiently stamped as a bond to secure a sum not exceeding £1000. [*Parke, B.*—It may be doubtful whether that case can be supported, since the decisions in *Doe d. Scruton v. Snaith* (b) and *Paddon v. Bartlett* (c).] The case of mortgages is provided for by express words. It can make no difference that the money is secured in the name of interest, if it be due when the bond is executed. The language of *Abbott, C. J.*, in *Pruessing v. Ing*, is in favour of the defendant. He says—"The object of the legislature was to impose a pro ratâ stamp duty upon the sum actually due at the time of taking the security, and not upon what might become due in future for the use of the money. The question therefore is, what was the sum due at the time when the note was taken; for that is the sum secured."

PARKE, B.—I think the stamp is sufficient, and that Mr. Cockburn's argument is well founded. The duty is imposed by the statute on bonds, in the following terms:—"Bond, &c., given as a security for the payment of any definitive and certain sum of money not exceeding £50, £1," &c. &c. I construe those words to mean the sum ascertained by the bond itself,—in other words, the principal sum. It is true, at the time of the execution of the bond in this case a sum was due for interest, which was ascertainable: but the amount of interest is not mentioned

(a) 1 B. & Adol. 343.

(b) 8 Bing. 146; 1 M. & Scott, 230.

(c) 2 Ad. & E. 9; 4 Nev. & M. 1.

in the bond, and must depend on the time when it is paid. I think the words "definitive and certain sum" refer to the principal money secured by the bond, which is to bear interest, and not to interest, whether bygone or subsequent. The case of *Pruessing v. Ing* was different from the present, and the judgment must be read with reference to the point then in question.

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ALDERSON, B.—I am of the same opinion. Interest does not fall within the meaning of a "definitive and certain sum of money" secured by the bond; it is only the amount of damage for the detention of the principal: and although the rate of payment of interest is mentioned in the bond, it forms no part of the definitive and certain sum for which the instrument is a security: whether bygone or subsequent, it is equally in the nature of damage for the non-payment of the sum advanced. The definitive and certain sum is that on which the damage follows, namely, the principal sum.

GURNEY, B.—I am of the same opinion. I see no distinction in this respect between interest bygone or to accrue in future; in either case it is beyond the definitive sum secured.

Rule discharged.

—◆—
BREST v. LEVER.

TRESPASS quare clausum fregit. Plea, that the close in which &c. was the close, soil, and freehold of the defendant; on which issue was joined. At the trial before Coleridge, J., at the last Wilts Assizes, the defendant,

Feb. 13.

A plea of liberum tenementum, to an action of trespass qu. cl. fr., is not supported by proof of the exercise of acts of

ownership by the defendant for a period of less than twenty years, where it appears that before the commencement of that period, and also within twenty years, the estate was in a third person.

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in support of his plea, proved acts of ownership exercised by him over the locus in quo, for a period of seventeen years before the commencement of the action. The plaintiff proved, that at an earlier period, and within twenty years, the property had been conveyed in fee to a person of the name of Barrow. Neither the plaintiff nor the defendant deduced any title from Barrow. The learned Judge, in summing up, told the jury that in his opinion the acts of ownership proved by the defendant made out a *primâ facie* case in support of the plea, notwithstanding the evidence given by the plaintiff: and a verdict was found for the defendant.

Bompas, Serjt., having obtained a rule nisi for a new trial, on the ground of misdirection,

Crowder and *Butt* shewed cause at the present sittings (Feb. 11), and contended that the question was properly left to the jury, and that it was not necessary for the defendant to produce his title-deeds, but that the acts of ownership made out a sufficient *primâ facie* title, which was not rebutted by the mere proof of the fact that at an earlier period the estate was in another.

Bompas, Serjt., *contrâ*.—By the plea of *liberum tenementum*, the defendant admits a possession in the plaintiff, but undertakes to destroy the presumption arising from such possession, by shewing a legal *title* in himself. This he might have done, either by proving his title by deed, or by shewing acts of ownership extending over a period of twenty years. But here he has attempted to prove a title by shewing the exercise of acts of ownership for a less period than twenty years; but the plaintiff rebuts that case, by shewing that within the twenty years the freehold was in a third party, in whom, *primâ facie*, it continues, unless the defendant prove a legal transfer of it to himself.

The earlier presumption must prevail until a better title is shewn : *Doe d. Harding v. Cooke (a)*.

Cur. adv. vult.

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The judgment of the Court was now delivered by

PARKER, B.—[Having stated the facts, his Lordship continued]:—By the plea of liberum tenementum, the defendant admits that the plaintiff is in possession, and that he himself is, *primâ facie*, a wrong doer; but he undertakes to shew a title in himself, which shall do away with the presumption arising from the plaintiff's possession. This he was bound to do, either by shewing title by deed, in the usual way, or by proving a possessory title for twenty years. But here the defendant has only proved acts of ownership extending over seventeen years, and has not connected them with any prior title; it amounts, therefore, to nothing more than a longer against a shorter possession—a mere priority of possession—and for a period insufficient to confer any title, except against a mere wrong doer. We think, therefore, that there was a misdirection, and that the rule for a new trial must be made absolute.

Rule absolute.

(a) 7 Bing. 346; 5 M. & P. 181.

HAWTAYNE (Public Officer of the Western District
Banking Company) *v.* BOURNÉ.

DEBT for money lent, and on an account stated. Plea, *nunquam indebitatus*. At the trial before *Maule, J.*, at

Feb. 13.

The resident
agent, appointed
by the directors of a
mining com-

pany to manage the mine, has not an *implied* authority from the shareholders of the company to borrow money upon their credit, in order to pay the arrears of wages due to the labourers in the mine, who have obtained warrants of distress upon the materials belonging to the mine, for the satisfaction of such arrears:—nor in any other case of necessity, however pressing.

Exch. of Pleas, the last Cornwall Assizes, the following appeared to be the
1841. facts of the case :

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The defendant, who resides at Liverpool, was the holder of 100 shares in a Company established for the working of a mine called the Trewolvas Mine, in the parish of St. Columb Major, Cornwall. The mine was managed by an agent, appointed by the directors of the Company for that purpose. In March 1889, in consequence of the shareholders not having paid up the calls regularly, the concern fell into difficulties, and the agent, from want of funds, became unable to pay the labourers; a considerable number of whom, their wages being in arrear, applied to the magistrates, and obtained warrants of distress upon the materials belonging to the mine. The agent, finding that these warrants were about to be put into execution, applied in the name of the Company, but in fact upon his own responsibility, and without the knowledge of the shareholders, to the St. Columb Branch of the Western District Banking Company, for a loan of £400 for three months, which was advanced accordingly, and placed by the Bank to the credit of the Company, and out of it the arrears of wages were discharged. To recover the balance of that sum the present action was brought. There was some evidence of a conversation between the defendant and the agent, in which the former had asked whether they could not get money from the Bank to keep the concern going: but this evidence was not left to the jury. The learned Judge, in summing up, stated to the jury, that although under ordinary circumstances an agent could not, without express authority, borrow money in the name of his principal, so as to bind him, yet if it became absolutely necessary to raise money in order to preserve the property of the principal, the law would imply an authority in the agent to do so, to the extent of that necessity: and he left it to the jury to say whether the pressure on the concern was such as to render the advance of this money a case of such necessity. The jury found for the plaintiff.

In Michaelmas Term, *Erle* obtained a rule nisi for a new trial, on the ground of misdirection. *Exch. of Pleas, 1841.*

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Bompas, Serjt., and *Cockburn* now shewed cause.—In the first place, there was evidence in this case to go to the jury of an express authority from the defendant to the agent to borrow money for the necessities of the mine. [*Alderson*, B.—That was not left to the jury: the learned Judge reports, that he thought the necessity of the case created, by law, a presumed authority to borrow money.] It was material as shewing the necessity, that the defendant had himself suggested that course. But secondly, the proposition stated to the jury was correct. This money was advanced, not to a common servant or clerk, but to an agent who was entrusted by the Company with authority to carry on the entire control and management of the mine, at a distance from his employers, with whom it was impossible for him to communicate on every sudden emergency. Under such circumstances, the agent has an implied authority to raise money on the credit of the shareholders, whenever an immediate outlay of money becomes necessary for the preservation of the concern. The principle of law is, that where an agent is employed for a specific purpose, he has an implied authority to do what is essentially necessary to carry that purpose into effect. It is like the case of the master of a ship, who has an implied authority to borrow money for the necessary use of the ship, upon the credit of the owner: *Robinson v. Lyall* (a), *Arthur v. Barton* (b). In like manner, where a poor person met with an accident, and was attended by the parish surgeon, the parish officers were held liable for the amount of the surgeon's bill, by reason of the necessity of the case: *Lamb v. Bunce* (c). Suppose a coach were to break

(a) 7 Price, 592.

(b) 6 M. & W. 138.

(c) 4 M. & Selw. 275.

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down on its journey, would not the coachman have authority to hire another, on the credit of his employers, for the conveyance of the passengers to the end of the journey? [*Parke, B.*—The law provides for that which is common, not for that which is unusual; on that principle it is that the master of a ship has authority to charge his owners, because ships are ordinarily exposed to casualties. There was no evidence here that it was the usual course to borrow money for the use of the mine.] Suppose water had burst in upon the mine, and it became necessary for its preservation immediately to employ persons to clear it, would not the agent have had authority to obtain an advance of the money necessary for that purpose? [*Parke, B.*—Suppose the bankers would not have advanced the money without a mortgage of the mine, would the agent have had authority to contract for a mortgage?] There was no evidence of any repudiation of the act of the agent, which was done solely with a view to the benefit of the Company, and the continuance of the concern; and there are many instances in which, where money has been laid out for a party's benefit, the law will imply a promise to repay it; as in the case of the acceptance of a bill of exchange for the honour of the drawer. [*Parke, B.*—That is by the custom of merchants.] Which arises out of the necessity of the case. [*Alderson, B.*—A party who draws a bill according to the custom of merchants, knows that by that custom a party taking it up for honour has a claim upon him. He contracts on that footing.] Suppose the directors themselves had borrowed this money, would not the partners generally be responsible? Then, whatever they can do, they have invested this their agent with authority to do.

Crowder (with whom was *Erle*), in support of the rule, was stopped by the Court.

PARKE, B.—This is an action brought by the plaintiffs,

who are bankers, to recover from the defendant, as one of the proprietors of the Trewolvas Mine, a mine carried on in the ordinary way, the balance of a sum of £400, advanced by them to the agent appointed by the Company of proprietors for the management of the mine. Now the extent of the authority conferred upon the agent by his appointment was this only—that he should conduct and carry on the affairs of the mine in the usual manner; there is no proof of express authority to borrow money from bankers for that purpose, or that it was necessary in the ordinary course of the undertaking; and certainly no such authority could be assumed. There are two grounds on which it is said the defendant may be made responsible; first, on that of a special authority given to the agent to borrow money; and secondly, on the assumed principle, that every owner who appoints an agent for the management of his property must be taken to have given him authority to borrow money in cases of absolute necessity. There certainly was, in the present case, some evidence from which a jury might have inferred that a power to borrow money, for the purposes of the mine, had been expressly given to the agent; but that evidence does not appear to have been left to the jury, and therefore the verdict cannot be supported on the first ground. Then as to the second ground, it appears that the learned Judge told the jury that they might infer an authority in the agent, not only to conduct the general business of the mine, but also, in cases of necessity, to raise money for that purpose. I am not aware that any authority is to be found in our law to support this proposition. No such power exists, except in the cases alluded to in the argument, of the master of a ship, and of the acceptor of a bill of exchange for the honour of the drawer. The latter derives its existence from the law of merchants; and in the former case the law, which generally provides for ordinary events, and not for cases which are of rare occurrence, considers how likely

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and frequent are accidents at sea, when it may be necessary, in order to have the vessel repaired, or to provide the means of continuing the voyage, to pledge the credit of her owners; and therefore it is that the law invests the master with power to raise money, and, by an instrument of hypothecation, to pledge the ship itself if necessary. If that case be analogous to this, it follows that the agent had power not only to borrow money, but, in the event of security being required, to mortgage the mine itself. The authority of the master of a ship rests upon the peculiar character of his office, and affords no analogy to the case of an ordinary agent. I am therefore of opinion, that the agent of this mine had not the authority contended for. Whether he had or had not was a question for the jury; but, on the general principles of law, it seems to me that the ruling of the learned Judge cannot be supported, and therefore that the rule for a new trial must be made absolute.

ALDERSON, B.—I am of the same opinion. There is no rule of law that an agent may, in a case of emergency suddenly arising, raise money, and pledge the credit of his principals for its repayment; and even if it were so, in this instance there was ample time and opportunity for him to have applied to his principals. Several cases have been cited as analogous to the present, but they have been already satisfactorily distinguished by my Brother *Parke*. *Lamb v. Bunce* may appear to be a case similar to the present, but it is very distinguishable, for there is an original liability in parish officers to support the poor in their parish; and it appears, moreover, that the parish officers in that case were aware of the surgeon being in attendance on the pauper, and made no objection. Those were circumstances from which a jury might well infer a contract on their part to pay his bill. In the present case there was no such evidence.

ROLFE, B., concurred.

Rule absolute.

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**PENLEY and Another, Executors of PENLEY, v. WATTS and
Another, Executors of WATTS.**

THIS was an action of covenant on a lease, brought by the plaintiffs, as the executors of William Penley, deceased, against the defendants, as the executors of George Watts, deceased. The declaration stated, that heretofore, and in the lifetime of the said W. Penley, since deceased, to wit, on the 26th day of March 1823, by a certain indenture made between one Edward Price of the one part, and the said W. Penley of the other part, the said Edward Price did demise and lease unto the said W. Penley, his executors and administrators, certain premises, particularly mentioned and described in the said indenture, to have and to hold the said messuage or tenement and dwelling-house, with a garden and fore-court, and other the premises thereto belonging, with the appurtenances, unto the said W. Penley, his executors, administrators, and assigns, from the 25th day of March then instant, for and during and unto the full end and term of sixteen years, wanting ten days, then next ensuing: and the said W. Penley did in and by the said indenture, for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree to and with the said Edward Price, his executors, administrators, and assigns (amongst other things), in manner following; that is to say, that he the said W. Penley, his executors, administrators, and assigns, should and would, at his and their own costs and charges, well and substantially repair, uphold, sustain, amend, glaze, pave, cleanse, scour, and keep the said demised messuage or tenement and premises, and the buildings and erections there-

Feb. 13.

A. leased premises to B., from the 25th of March, 1823, for 16 years wanting ten days, and B. covenanted with A. to keep the premises in repair, and to paint once in every five years of the term, and to leave the premises in repair. B. underleased the premises to C., from the 24th of June, 1834, for four years and three quarters wanting eleven days, and C. covenanted with B. to keep the premises in repair (the covenant so far being in the same terms as in the original lease), and to paint once during the term, and to leave the premises in repair. A. sued B. for breaches of this covenant, and B. let judgment go by default, and upon the writ of inquiry the damages were assessed at 64*l.* 10*s.*, being the amount of dilapidations

proved by a surveyor, whose estimate had been laid before B. previous to the commencement of the action. B. afterwards sued C. for the amount of the dilapidations, and the costs of the action brought against him. The jury found the amount of the dilapidations to be 57*l.* 10*s.*:—*Held*, that B. was not entitled to recover also the amount of the costs in the former action.

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upon erected and built, in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever, save and except the outhouses or outbuildings, as to which it should be merely necessary to keep them in the same state as they then were; and particularly should and would, once in every three years during the said term, well and sufficiently paint or cause to be painted in good oil colours all the outside wood and iron work of and belonging to the said messuage or tenement, and such of the said buildings as were then painted, and the inside wood and iron-work, once every five years during the said term; and also should and would hedge, ditch, scour, cleanse, and repair all and singular the hedges, ditches, gates, fences, and quicksets, posts, pales, iron and other rails, walls, privies, sinks, sewers, drains, and vaults belonging to the said demised premises; and the same being in all things so as aforesaid repaired, upheld, sustained, amended, glazed, paved, cleansed, scoured, and kept, and the hedges, ditches, gates, fences, quicksets, posts, pales, iron and other rails, privies, sinks, sewers, drains, and vaults so hedged, ditched, scoured, cleansed, and repaired, should and would, at the end or other sooner determination of the said term, peaceably and quietly leave, surrender, and yield up unto the said Edward Price, his executors, administrators, and assigns, together with all and every the locks, keys, bolts, bars, chimney-pieces, dressers, shelves, water-pipes, and other things which then were or which should at any time thereafter be set up, affixed, or fastened to the said demised messuage or tenement, or dwelling-house, with the garden or fore-court thereunto belonging, or any part thereof, (fixtures of the nature of furniture, and damaged by accidental fire, only excepted): by virtue of which said demise the said W. Penley then entered into and upon the said demised premises, and became and was possessed thereof for the said term so to him thereof granted by the said Edward Price as afore-

said; and being so thereof possessed, afterwards, and during the respective lives of the said W. Penley and G. Watts, both since deceased, to wit, on the 23rd day of June, A. D. 1834, by a certain indenture then made by and between the said W. Penley of the one part, and the said G. Watts of the other part [profert], the said W. Penley did demise and lease unto the said G. Watts, his executors and administrators, the said several premises particularly mentioned and set forth in the said last-mentioned indenture, being the same premises which were demised to the said W. Penley by the said Edward Price, as hereinbefore mentioned; to have and to hold the said messuage or tenement and dwelling-house, with the garden and fore-court and other the premises thereto belonging, unto the said G. Watts, his executors, administrators, and assigns, from the 24th day of June then instant, for and during and unto the full end and term of four years and three-quarters of another year, wanting eleven days, thence next ensuing; and the said G. Watts did, in and by the said last-mentioned indenture, amongst other things, for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree to and with the said W. Penley, his executors, administrators, and assigns, in manner following, that is to say, that the said G. Watts, his executors, administrators, and assigns, should and would, at his and their own costs and charges, well and substantially repair, uphold, sustain, amend, glaze, pave, cleanse, scour, and keep the said demised messuage or tenement and premises, and the buildings and erections thereupon erected and built, in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever, save and except the outhouses or outbuildings, as to which it should merely be necessary to keep them in the same state as they then were; and particularly should and would once during the said term thereby granted, well and sufficiently paint or cause

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to be painted in good oil colours all the inside and outside wood and iron-work of and belonging to the said messuage or tenement, and such of the buildings as were then painted; and also should and would scour, cleanse, and repair, all and singular the gates, fences, posts, pales, iron and other rails, walls, privies, sinks, sewers, drains, and vaults belonging to the said demised messuage or tenement, outbuildings, hereditaments, and premises; and the said messuage or tenement, buildings, hereditaments, and premises, being in all things so as aforesaid repaired, upheld, sustained, amended, glazed, paved, cleansed, scoured, and kept, should and would at the end or other sooner determination of the said term thereby granted, peaceably and quietly leave, surrender, and yield up unto the said W. Penley, his executors, administrators, and assigns, together with all and every the doors, locks, keys, bolts, bars, chimney-pieces, dressers, shelves, water-pipes, and other things which then were or which should at any time thereafter be set up, affixed, or fastened to the said demised premises, or any part thereof, (fixtures in the nature of furniture, and the fixtures in the schedule to the now-stating indenture, and damage by accidental fire, only excepted), as by the said last-mentioned indenture, reference being thereunto had, will, amongst other things, more fully and at large appear.—The declaration then averred, that G. Watts entered into the demised premises, and continued in possession thereof until his death, upon which the premises vested in the plaintiffs as executors; and proceeded to assign breaches of the covenant in not repairing; alleging as special damage, that in consequence of the premises being out of repair, Price had brought an action against the plaintiffs as executors, in which he had recovered against them certain damages and costs, which, together with their own costs in defending such action, they had been forced and obliged to pay. The defendants by their plea denied the breaches assigned, and issue was joined thereon.

At the trial before *Alderson*, B., at the Middlesex Sittings in last Michaelmas Term, it appeared that an action had been brought by Price, the original lessor, against the present plaintiffs, for breaches of the covenant to repair in the original lease to the plaintiffs' testator, in which judgment was suffered to go by default, and upon a writ of inquiry the damages were assessed at the sum of 64*l.* 10*s.*, the amount of dilapidations proved by a surveyor, whose estimate had been made, and laid before the now plaintiffs, before the action was commenced: the costs in that action also amounted, the plaintiff's to £36, and the defendants' to £40: all which sums had been paid by the present plaintiffs. The learned Judge expressed his opinion that the costs in that action had been unnecessarily incurred, and that, inasmuch as there was no covenant by Watts to indemnify Penley against any breach of the covenants in the original lease, the defendants were not liable to the repayment of those costs: and the amount of dilapidations being proved at the sum of 57*l.* 10*s.*, the plaintiffs had a verdict for that sum only, leave being reserved to them to increase that amount by the sum of £76.

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Thesiger having obtained a rule nisi accordingly, citing *Neale v. Wyllie* (a),

Kelly and *Saunders* now shewed cause.—The ruling of the learned Judge was right. One fact which clearly distinguishes this case from the others on this subject, is that the respective covenants of the plaintiffs' testator, Penley, and of the defendants' testator, Watts, are not in the same terms. They differ as to the periods of painting the outside and inside work. And the present plaintiffs have recovered a smaller amount of damages than that recovered against them, which shews that the breaches cannot have

(a) 3 B. & Cr. 533; 5 D. & R. 442.

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been identically the same. But independently of these considerations, the plaintiffs are not entitled to recover the amount of the costs in the action brought against them. The foundation of the right to special damage in the payment of monies, is that the party has been *forced and obliged* to pay them. They must have been expenses paid under legal compulsion, which he could not resist or prevent. The judgment of the Court in *Neale v. Wyllie* rests entirely on the ground, that the costs were damages sustained through the neglect of the defendant, and not in consequence of the plaintiff's own default: but here the costs were incurred unnecessarily. It does not appear, in *Neale v. Wyllie*, that there had been any communication between the original lessor and lessee, or that the latter had any means of resisting the demand of the lessor, or of taking any other course than he did: whereas here the amount of the dilapidations was ascertained and made known to the plaintiffs before action brought, and by payment of that sum they might have prevented the action altogether. Again, *Neale v. Wyllie* was decided before the right existed to pay money into Court in an action of covenant: therefore the defendant there was obliged to suffer judgment by default, in order to reduce the damages to their real amount; so that he could not have prevented the incurring of any part of the costs. But now, under the new rules, the present plaintiffs might have paid the money into Court after declaration. The very principle of their claim is, that they were forced and obliged to pay the costs, which they clearly were not. Besides, in *Neale v. Wyllie* the covenants were in terms the same, and the respective amounts of damages the same, which is not the case here. Suppose an action brought against the drawer of a bill, who resists it without having any real defence; he cannot recover the costs over against the acceptor. In *Short v. Kalloway (a)*, Lord Denman, C. J., says, "No person has a

(a) 11 Ad. & E. 28.

right to inflame his own account against another, by incurring additional expense in the unrighteous resistance to an action which he cannot defend." It must be remembered that this is not the case of a contract *to indemnify at all events*. *Smith v. Compton* (a) may appear to be against the defendants, but it is not really so, because the case was put entirely on the ground of the covenant in that case (a covenant for good title) being an absolute covenant of indemnity. If the plaintiffs have any remedy in respect of these costs, it must be by action on the case, if there have been any breach of duty in the defendants, whereby they have been subjected to loss: but this action must rest entirely on the covenant, which contains no contract of indemnity.

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Thesiger and *Ogle*, *contra*.—The only question is, whether these costs were or were not necessarily incurred; and that depends on whether they were necessarily consequent upon the defendants' breach of covenant. It is said the plaintiffs had such notice of the amount of the damage, that they might have prevented the costs by payment. But that is not so. They were not bound to abide by the mere statement of the surveyor, and they would have been trespassers by going upon the premises to ascertain the amount of the dilapidations for themselves. It now turns out that the real amount of them is less than that originally stated by the surveyor. It is said the covenants are in different terms; but that must be the case, because the covenant must be framed with reference to the state of the premises at the time, and the duration of the term: they are in effect the same. In *Neale v. Wyllie*, the plaintiff, who had a reversion, might equally have ascertained and paid the amount of the dilapidations; or he might have tendered such a sum as a

(a) 3 B. & Ad. 407.

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surveyor on his behalf might have considered him liable to. It does not appear that he took any step whatever to prevent the action. But then it is said the present plaintiffs might have saved part of the costs by payment into Court. But suppose the plaintiffs had gone on notwithstanding—the costs would then have been increased. If the performance of the defendants' covenant would have discharged the plaintiffs from all obligation by reason of their covenant, that is sufficient to render the defendants liable. The question is, whether the covenant is identical in those respects to which the breaches of covenant apply. It is said this is no contract of indemnity; the same objection might have been urged in *Neale v. Wyllie*, but the Court thought the plaintiff entitled to recover, because the money had been paid through the consequences of the defendants' default. But in some sense an under-lessee may be considered as a party indemnifying, as an assignee: *Wolveridge v. Steward* (a). [Parke, B.—The lessee and his assignee are liable to precisely the same extent, and the assignee is a surety for the lessee; but that is not the case in a sub-lease: the only contract of the sub-lessee is to perform the covenant in his sub-lease: and the only question here is, whether these costs were the necessary consequence of the breach of such covenant. There is clearly no contract of indemnity.] For all that is within the defendants' covenant, it is entirely owing to their default that the action was brought against the plaintiffs. In *Lewis v. Peake* (b), it was held that if the buyer of a horse with warranty, relying thereon, resells him with warranty, and being sued by his vendee, offers the defence to the vendor, who does not interpose, the party defending that action is entitled to recover the costs of it from the original seller of the horse, as part of the damage occasioned by

(a) 1 C. & M. 660.

(b) 7 Taunt. 153; 2 Marsh. 431.

his breach of warranty. [*Parke, B.*—That case was re-considered in a case which was tried before me at Norwich, of *Wrightup v. Chamberlain (a)*.] The same principle is laid down in *Pennell v. Woodburn (b)*. [*Parke, B.*—Those cases would be applicable, if the action had been defended in the belief that the premises were in repair. The case of a warranty applies to an existing state of things, not to a thing to be done in future. Those cases would apply to a covenant that the premises, *then were* in a good state of repair.] At all events, this case is not distinguishable from *Neale v. Wyllie*, it being taken into consideration, that the under-lessee's covenant to repair must necessarily be different in terms from that of the original lessee.

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PARKE, B.—It seems to me that this rule must be discharged. This is not an action on a contract of indemnity; ; if it were, the defendants would be responsible, unless they had put themselves into the same condition as the plaintiffs, and saved them from all harm, and amongst other things, from the costs of the action brought against them; and if the plaintiffs had desired to be so secured, they might have made themselves safe by taking a covenant of indemnity against any breach of the covenants in the original lease; and then they might have recovered these costs: *Duffield v. Scott (c)* is an authority for that. But this is not a contract of indemnity, but only a covenant to keep the premises in a certain state of repair, and a covenant materially differing in its terms from that of the plaintiffs. [His Lordship stated the respective covenants.] These two covenants are not *ad idem* either in substance, or in terms, the dates are different; and under the defendants' contract, the amount of damages is, the damage necessarily sustained by the breach of their own

(a) 7 Scott, 598.

(b) 7 C. & P. 117.

(c) 3 T. R. 364; see also *Jones v. Williams*, ante, 493.

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covenant, viz. the amount necessary to put the premises in the same state of repair in which the defendants ought to have kept them. We were strongly of that opinion when this rule was moved, but upon the case of *Neale v. Wyllie*, we thought it expedient to grant a rule; and if the circumstances had been exactly the same as they were in that case, we should have considered ourselves bound by it, although we cannot help thinking that the Court, on that occasion, had not exactly considered the relation of the parties, and the circumstance that the covenants were not in terms the same. In that case there was a demise of premises to one Finch, by an indenture which contained a covenant to repair, and to leave in repair at the end of the term; and the declaration stated, that the interest of Finch vested by assignment in the defendant, who, during the term, suffered the premises to be out of repair, and so left them at the end of the term, by reason whereof the plaintiff had been forced and obliged to pay to one Elizabeth Coppock (by whom the premises had been demised for a longer term to the plaintiff, before his grant of the lease to Finch) the damages and costs in an action brought to recover the premises. The Court there thought that the covenants were the same, and that the plaintiff would not have protected himself by coming on the premises, or by payment. But the present case differs from that in three particulars:—first, the two covenants, which there were assumed to be the same, here differ materially; secondly, here the plaintiffs might have saved themselves from all the costs, if they had paid the amount the surveyor demanded from them; and thirdly, (although that would go only in reduction of damages), it was competent to them to have paid money into Court, and so not to have incurred the subsequent costs. I cannot but think, however, that the Court, in *Neale v. Wyllie*, would not have come to the conclusion they did, if they had adverted to the circumstance that there were two different

covenants, under which a different measure of damages was recoverable. But admitting that case to be law, it is materially distinguishable from the present. The only true measure of damages here is, what it would have cost the defendants to put the premises in repair. If the plaintiffs have expended more, that is their own fault, for which the defendants are not liable.

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ALDERSON, B.—I am of the same opinion. In *Neale v. Wyllie*, the Court thought that performance by the assignee of the lessee would have been a performance by the lessor. Whether they were right may admit of question; but that was the principle of their decision. That would not have been so here; and therefore it would not necessarily have prevented Price from bringing the action against the plaintiffs. These are materially different covenants. [His Lordship stated them.] A performance of the one, therefore, would by no means necessarily be a performance of the other. The case is distinguishable from *Neale v. Wyllie* also in the other points mentioned by my Brother Parke; and upon the whole, I do not see how the payment by the plaintiffs was a necessary consequence of the breach by the defendants. I think, therefore, that I was right in the course I took at the trial.

Rule discharged.

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NEGELEN v. MITCHELL.

Assumpsit on a special agreement, whereby, in consideration of the sale to the defendant of a portrait, and the exclusive copyright of engraving the same for publication; the defendant promised to pay £150, and to deliver to the plaintiff fifty proof impressions of the engraving when made therefrom. The declaration averred that the engraving was made, and that the money was paid, and alleged as a breach, that, although a reasonable time had elapsed for the delivery of the fifty proof impressions, and although the defendant was required to

do so, yet the defendant had not delivered them or any part of them, and had neglected and refused so to do. Plea, that, after the making of the promise in the declaration mentioned, and after the making of the said engraving, the defendant delivered to the plaintiff ten proof impressions thereof in part performance of his said promise, and the plaintiff accepted the same in satisfaction and discharge of the promise as to ten of the fifty impressions; that he then was ready and willing, and then tendered and offered to the plaintiff to deliver to him forty other impressions of the said engraving, which the plaintiff then refused to accept or receive, and then requested the defendant to let him have the choice of forty of all the impressions that were printed, to which request the defendant then acceded, and the plaintiff then promised the defendant to make his selection of the said forty proof impressions out of all the impressions that were then printed: that the defendant had always been ready and willing to let the plaintiff choose the said forty out of all the impressions then printed, but that the plaintiff had never made any selection of the same, but had always thence hitherto neglected to do so; *absque hoc* that the defendant refused and neglected to deliver to the plaintiff the said fifty proof impressions, as in the declaration in that behalf alleged:—*Held*, that the plea was bad after verdict.

Where there are several pleas on the record, if one of them traverse immaterial matter in the declaration, and the defendant has pleaded other material matters which have been disposed of on proper issues, the Court will not grant a repleader.

ASSUMPSIT.—The declaration stated, that whereas before the making of the promise thereafter mentioned, the plaintiff had with great skill designed, made, and prepared a certain portrait or drawing of a certain person, to wit, Madame Grisi: And whereas the defendant, before the making of the said promise, was desirous of purchasing the said portrait or drawing, and of making prints or engravings therefrom, and publishing the same for the profit of him the defendant; and thereupon, before the commencement of this suit, to wit, on the 21st day of February, A. D. 1839, in consideration of the premises, and that the plaintiff, at the request of the defendant, had then sold to the defendant the said portrait or drawing, together with the exclusive copyright of printing or engraving the same for publication, for the price or sum of £150, and fifty proof impressions, he the defendant promised the plaintiff to pay him the said sum of £150 in two months from the day and year last aforesaid, and to deliver to the plaintiff fifty proof impressions of the print or engraving of the said portrait or drawing when made therefrom; and the plaintiff avers, that although the defendant then had and received the said portrait or drawing,

and afterwards, to wit, on the same day and year, made a print or engraving therefrom, and although the defendant, in part performance of his said promise, did afterwards, and at the expiration of the two months aforesaid, pay the plaintiff the said sum of £150, yet, although a reasonable time for the delivery to the plaintiff of fifty proof impressions of the said print or engraving had elapsed before the commencement of this suit, and although the defendant, after the expiration of such reasonable time, and before the commencement of this suit, to wit, on the same day and year, was requested to deliver to the plaintiff fifty proof impressions of the said print or engraving, the defendant has disregarded his promise, and has not delivered to the plaintiff fifty proof impressions of the said print or engraving, or any or either of them, or any part thereof, and has neglected and refused so to do.—There were also counts for goods sold, work and labour, and on an account stated.

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The defendant pleaded, except as to the first count, non assumpsit; secondly, as to the request mentioned in the first count, to deliver fifty proof impressions of the said print, that he was not so requested: thirdly, that he the defendant, after making the print or engraving from the said portrait or drawing as in that count mentioned, delivered to the plaintiff fifty proof impressions of the same, according to his said promise in the said first count mentioned: fourthly, “that after the making of the said promise of the defendant in that count mentioned, and after the making of the said print or engraving from the said portrait or drawing, to wit, on the said day and year in the said first count mentioned, the defendant delivered to the plaintiff ten proof impressions of the said print or engraving, in part performance of his said promise in that behalf, and the plaintiff then accepted, had, and kept the said ten proof impressions, in satisfaction and discharge of the said promise of the defendant in the said first count

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Assumpsit on a special agreement, whereby, in consideration of the sale to the defendant of a portrait, and the exclusive copyright of engraving the same for publication; the defendant promised to pay £150, and to deliver to the plaintiff fifty proof impressions of the engraving when made therefrom. The declaration averred that the engraving was made, and that the money was paid, and alleged as a breach, that, although a reasonable time had elapsed for the delivery of the fifty proof impressions, and although the defendant was required to

do so, yet the defendant had not delivered them or any part of them, and had neglected and refused so to do. Plea, that, after the making of the promise in the declaration mentioned, and after the making of the said engraving, the defendant delivered to the plaintiff ten proof impressions thereof in part performance of his said promise, and the plaintiff accepted the same in satisfaction and discharge of the promise as to ten of the fifty impressions; that he then was ready and willing, and then tendered and offered to the plaintiff to deliver to him forty other impressions of the said engraving, which the plaintiff then refused to accept or receive, and then requested the defendant to let him have the choice of forty of all the impressions that were printed, to which request the defendant then acceded, and the plaintiff then promised the defendant to make his selection of the said forty proof impressions out of all the impressions that were then printed: that the defendant had always been ready and willing to let the plaintiff choose the said forty out of all the impressions then printed, but that the plaintiff had never made any selection of the same, but had always thence hitherto neglected to do so; *absque hoc* that the defendant refused and neglected to deliver to the plaintiff the said fifty proof impressions, as in the declaration in that behalf alleged:—*Held*, that the plea was bad after verdict.

Where there are several pleas on the record, if one of them traverse immaterial matter in the declaration, and the defendant has pleaded other material matters which have been disposed of on proper issues, the Court will not grant a replender.

ASSUMPSIT.—The declaration stated, that whereas before the making of the promise thereafter mentioned, the plaintiff had with great skill designed, made, and prepared a certain portrait or drawing of a certain person, to wit, Madame Grisi: And whereas the defendant, before the making of the said promise, was desirous of purchasing the said portrait or drawing, and of making prints or engravings therefrom, and publishing the same for the profit of him the defendant; and thereupon, before the commencement of this suit, to wit, on the 21st day of February, A. D. 1839, in consideration of the premises, and that the plaintiff, at the request of the defendant, had then sold to the defendant the said portrait or drawing, together with the exclusive copyright of printing or engraving the same for publication, for the price or sum of £150, and fifty proof impressions, he the defendant promised the plaintiff to pay him the said sum of £150 in two months from the day and year last aforesaid, and to deliver to the plaintiff fifty proof impressions of the print or engraving of the said portrait or drawing when made therefrom; and the plaintiff avers, that although the defendant then had and received the said portrait or drawing,

and afterwards, to wit, on the same day and year, made a print or engraving therefrom, and although the defendant, in part performance of his said promise, did afterwards, and at the expiration of the two months aforesaid, pay the plaintiff the said sum of £150, yet, although a reasonable time for the delivery to the plaintiff of fifty proof impressions of the said print or engraving had elapsed before the commencement of this suit, and although the defendant, after the expiration of such reasonable time, and before the commencement of this suit, to wit, on the same day and year, was requested to deliver to the plaintiff fifty proof impressions of the said print or engraving, the defendant has disregarded his promise, and has not delivered to the plaintiff fifty proof impressions of the said print or engraving, or any or either of them, or any part thereof, and has neglected and refused so to do.—There were also counts for goods sold, work and labour, and on an account stated.

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The defendant pleaded, except as to the first count, non assumpsit; secondly, as to the request mentioned in the first count, to deliver fifty proof impressions of the said print, that he was not so requested: thirdly, that he the defendant, after making the print or engraving from the said portrait or drawing as in that count mentioned, delivered to the plaintiff fifty proof impressions of the same, according to his said promise in the said first count mentioned: fourthly, "that after the making of the said promise of the defendant in that count mentioned, and after the making of the said print or engraving from the said portrait or drawing, to wit, on the said day and year in the said first count mentioned, the defendant delivered to the plaintiff ten proof impressions of the said print or engraving, in part performance of his said promise in that behalf, and the plaintiff then accepted, had, and kept the said ten proof impressions, in satisfaction and discharge of the said promise of the defendant in the said first count

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mentioned, as to ten of the said fifty proof impressions to be delivered as in the said first count mentioned; and the defendant further saith, that he then, to wit, on the said day and year aforesaid in the said first count mentioned, was ready and willing, and then tendered and offered to the plaintiff, to deliver to him forty other proof impressions of the said print or engraving, which the plaintiff then refused to accept or receive, and then requested the defendant to let him the plaintiff have the choice of forty of all the impressions that were printed, to which request the defendant then acceded, and the plaintiff then promised the defendant that he would make his selection of the said forty proof impressions of all the impressions that were then printed, to wit, of two hundred impressions then printed: and the defendant says, that he has been always ready and willing thence hitherto to let the plaintiff choose the said forty out of all the impressions of the said print or engraving then printed, but that the plaintiff has never made any selection of the same, and the plaintiff himself has always thence hitherto neglected to make a selection as aforesaid: without this, that he the defendant refused and neglected to deliver to the plaintiff the said fifty proof impressions, as in the said first count in that behalf alleged.—On these several pleas issues were joined.

At the trial before Lord *Abinger*, C. B., at the Middlesex Sittings after last Trinity Term, the jury found a verdict for the defendant on the first and fourth issues, and for the plaintiff on the second and third, with £30 contingent damages as the value of the forty prints, if the Court should be of opinion that the plaintiff was entitled to judgment non obstante veredicto on the fourth plea. In the early part of Michaelmas Term, *Thesiger* obtained a rule for judgment non obstante veredicto accordingly.

Kelly and *Hoggins* shewed cause in the same term, (Nov.

20).—It will be said on the other side, that the traverse at the conclusion of the plea is an immaterial traverse; but that is not so. The plea contains an express reference to the averment of readiness and willingness to deliver contained in the declaration: it commences with an inducement, and concludes with a special traverse. Perhaps the plea might be bad on special demurrer, but after verdict it is a substantial answer to the first count. The rule with respect to inducements is thus laid down in Stephen on Pleading, 183 (a), “that the inducement should be such as in itself amounts to a sufficient answer in substance to the last pleading.” This plea being in denial of the neglect and refusal to deliver the prints, as alleged in the declaration, it will be necessary to call attention to the declaration. It alleges, that although a reasonable time for the delivery to the plaintiff of the prints had elapsed before the commencement of the suit, and although the defendant, after the expiration of such reasonable time, was requested to deliver to the plaintiff the prints, the defendant had not delivered them, but had neglected so to do. The plea, especially after verdict, contains a substantial answer to that breach. [Lord Abinger, C. B.—This is a plea in accord and satisfaction.] After verdict, it will be presumed that this substituted agreement was received in satisfaction of the former agreement. [Parke, B.—If you strike out the conclusion, of the special traverse, you will find that the plea is defective.] It is submitted that it is a good answer after verdict. The Judge could not have left it to the jury to find for the defendant, unless that which is alleged in the plea took place within a reasonable time. The plea alleges that he the defendant then, to wit, on *the said day and year aforesaid in the said first count mentioned*, was ready and willing and then tendered and offered the plaintiff to deliver the forty prints. What is the day and year in the first count mentioned? It is the *reasonable time* mentioned in the declaration; and

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this amounts in substance to an allegation that an offer to deliver the prints was made within a reasonable time. Mr. Serjeant *Williams*, in his notes to *Stennell v. Hogg* (a), speaking of imperfections which are cured by a verdict at common law, says—"Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the Judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission, is cured by the verdict by the common law." The Court must look to the whole of the plea. [*Parke*, B. The whole of your argument turns on the allegation of "the day and year aforesaid in the first count mentioned;" but you cannot contend that it was necessary to prove the precise day alleged, for that is not material. You do not aver that the day and year mentioned in the declaration was within a reasonable time. If the traverse is struck out, it is clearly a bad plea. Every allegation in the plea would be supported by proof of a tender and acceptance twelve months afterwards.] The authorities are very strong as to the defect being cured by verdict, of which many instances are put in Mr. Serjeant *Williams's* notes to the case of *Stennell v. Hogg*. If the defendant did not, as is in substance alleged in the plea, tender and offer to deliver the prints within a reasonable time, the Judge could not have left the issue to the jury, and the jury could not have found a verdict in favour of the defendant. The new rules do not affect the mode of pleading this special traverse. In the *Cross Keys Bridge Company v. Rawlings* (b), the declaration was for carelessly impinging with a ship against the plaintiff's bridge, whereby damage accrued; and there was a plea that the plaintiffs improperly narrowed the

(a) 1 Saund. 227.

(b) 3 Bing. N. C. 71; 3 Scott, 400.

channel by an obstruction, without this, that the damage was occasioned by the carelessness of the defendants; and it was held, that under this plea the defendants were entitled to give evidence in disproof of their carelessness, after they had failed to establish the obstruction imputed to the plaintiffs. *Tindal*, C. J., there says—"The effect of a traverse in pleading is the same as it was before the new rules;" and he adds, "I cannot see how the plaintiff is injured by such a mode of pleading; for by the special inducement the defendants shew that one ground on which they mean to rely is, that the accident was occasioned by the default of the plaintiffs, and not by the negligence of the defendants. And though they failed to establish any default in the plaintiffs, I think they are at liberty, under such a plea, to shew also that the defendants have not been guilty of negligence." If this plea had concluded with a verification, the replication would have been that the defendant did neglect, &c. Then is not the verdict found in accordance with that view? The question before the jury was, did the defendant neglect or refuse to deliver the prints as in the declaration mentioned, and the jury having found in favour of the defendant, all the evidence necessary to support that finding must be assumed to have been given at the trial. In *Rushton v. Aspinall* (a), Lord Mansfield states the rule to be, "that where the plaintiff has stated his title or ground of action defectively or inaccurately,—because, to entitle him to recover, all circumstances necessary, in form or substance, to complete the title so imperfectly stated, must be proved at the trial,—it is a fair presumption, after a verdict, that they were proved."—They cited also *Frederick v. Lookup* (b), *Amey v. Long* (c), *Ward v. Harris* (d), *Mackmurdo v. Smith* (e), *Dalby v. Hors* (f), *Bradley v. Milnes* (g), and *Humphreys v. Pratt* (h).

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(a) Doug. 683.

(b) 4 Burr. 2018.

(c) 6 East, 473.

(d) 2 Bos. & Pull. 27.

(e) 7 T. R. 518.

(f) 1 Brod. & Bing. 221.

(g) 1 Bing. N. C. 614. 1 Summ. 603.

(h) 2 Dow. & Clark 222.

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Thesiger and Cowling, contra.—The authority of the cases cited on the other side is not disputed. All those cases were intended to establish a distinction between a statement of a defective title, and a title defectively stated. This is not a good answer defectively stated. The real breach of contract here is, that the defendant has not delivered the forty prints, and has neglected so to do. The contract was broken by the non-delivery, and the plaintiff establishes his breach by shewing that they have not been delivered. If the defendant had any answer as to the non-delivery, he should have pleaded it. If this is to be taken as a plea with a special traverse, it is altogether bad, because it is in confession and avoidance; for it amounts to this—I did not neglect to deliver, because I was excused. [*Parke, B.*—The question is as to the meaning of the traverse; if it is a denial of the breach, the plea is good after verdict.] The plea states matter of excuse, and says, therefore I have not neglected to deliver—it states circumstances to shew that there was no neglect, and which yet admit that there was a non-delivery. The plea cannot be read without the inducement, because that throws light upon the traverse. In *Stephen on Pleading*, 183 (a), it is said, “It is a rule that the inducement should be such as in itself amounts to a sufficient answer in substance to the last pleading; for it is the use and object of the inducement to give an explained or qualified denial; that is, to state such circumstances as tend to shew that the last pleading is not true; the *absque hoc* being added merely to put that denial in a positive form, which had been previously made in an indirect one.” If that rule be kept in view, the plea is bad, inasmuch as it expressly shews that the prints have not been delivered. It is impossible after verdict to presume that that was proved at the trial. If the plea had stated that the defendant was ready and

(a) 3rd edition.

willing, and tendered to deliver the prints at the end of a reasonable time, that would have been bad; because the party must always have been willing to deliver the goods, unless they are of a cumbersome nature, which these were not. *Stone v. Gilliam* (a) is the only case where it is laid down that there need not be an actual tender of the goods, and there Lord *Holt* takes a distinction between the case of cumbersome goods and those which are portable; holding, in the former case, that the bringing them to a convenient place from whence they might be loaded on board a ship, and offering the master to send them on board, was a sufficient tender. That, however, is a totally different case from the present, where the goods were portable. In 1 Wms. Saund. 33 c. it is said—"The action of assumpsit being to recover *damages* against the defendant for the non-performance of his promise, a tender cannot in this action be pleaded in bar of the *damages*, for that would be to preclude the plaintiff from recovering his debt, which cannot be, for the debtor must nevertheless pay the debt." But this plea is clearly bad for not averring that the defendant tendered the latter forty prints. [*Parke*, B.—Would it not be good to plead simply that he did not neglect to deliver, in manner and form?] This is a bad plea, because it takes issue on that which is merely aggravation. On the other point, that the inducement cannot be neglected, *Craven v. Sanderson* (b) is an authority. There *Littledale*, J., says—"In pleas where the traverse is led to by an inducement, facts stated in the introductory part may be very fit to be proved with reference to the matter traversed, but they do not require to be proved as forming part of the inducement." The traverse here is a mere explanation of the inducement, and the inducement ought to be read as connected with the traverse; and if so, the

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(a) 1 Show. 149.

(b) 4 Ad. & Ell. 672.

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1841. immaterial fact.

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Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—The question in this case arises upon a motion for judgment non obstante veredicto, on the fourth plea.

The plaintiff declared on a special agreement, whereby, in consideration of the sale of a portrait, and of the exclusive copyright of printing or engraving the same for publication, the defendant promised to pay the plaintiff £150 in two months, and to deliver to the plaintiff fifty proof impressions of the print or engraving, when made therefrom. The declaration avers that an engraving was made, and £150 paid, and alleges as a breach, that although a reasonable time had elapsed for the delivery of fifty proof impressions, and although the defendant was requested to do so, yet the defendant had not delivered to the plaintiff fifty proof impressions, or any part thereof, and had neglected and refused so to do. The fourth plea, on which the question arises, is as follows. [His Lordship here read the plea, as ante, p. 618.]

It is to be observed, that the contract, as above stated, required the fifty impressions to be delivered as soon as they were made, or at least a reasonable time afterwards, and the non-delivery at that time is the breach alleged. The rest of the matter stated in the breach, of the non-delivery generally, and the general neglect and refusal, is surplusage. According to the rules of correct pleading, the plea to this breach should either have stated, that the impressions were so delivered, or should have confessed that they were not, and stated some sufficient matter of avoidance. But the plea in this case (if we read it with-

out the traverse at the end) contains neither of these requisites; it does not state a delivery of the whole, nor a delivery in due time of any part, and therefore is not good by way of denial of the breach; nor, if it is to be taken to have confessed the breach, does it sufficiently avoid it; for, as to part, though it states a tender, the tender is not averred to have been in due time, and what is pleaded afterwards amounts to accord without satisfaction as to that part. The plea, therefore, would be bad without the special traverse; and would be so non obstante veredicto. And with the special traverse, it is perfectly clear it would have been bad on special demurrer, for several reasons.

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But the question is, whether after verdict, this special traverse, issue being joined thereon, is good; and this is the only point on which the Court entertained any doubt, when the case was argued. If the traverse had stood alone, without the inducement, the Court at one time intimated its opinion that it would have been good, as a denial of the breach, on the ground that a plea of non infregit conventionem (a), though bad on demurrer, would have been good after verdict: but on consideration, we are not satisfied that such a traverse would have been a denial of the breach, that is, would have been equivalent to an averment of delivery in due time, even if it had stood alone: but, taken with the inducement, it seems to us that it cannot be understood in any other sense than as a denial of the neglect and refusal altogether to deliver; for the inducement in effect admits non-performance: and then the special traverse, to be consistent, must be taken to mean an averment that the defendant, although he had not delivered in due time, had not altogether refused and neglected to deliver, which is the averment in the declaration, for the declaration asserts in effect that the defendant has never delivered at any time, and has altogether neglected

(a) 1 Lev. 183; Com. Dig., Pleader, (2 V.) 5.

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and refused so to do. In that mode of construing the plea, the traverse is bad. If the defendant had proved at the trial an offer to deliver the day before the writ issued, long after a reasonable time had elapsed, the issue would have been found for the defendant; and would certainly be no good answer in point of law.

That being so, the next question is, whether the plaintiff is not entitled to judgment non obstante veredicto. We think he is, and that it is not a case for a repleader. If this had been the sole plea, it would have been a case for a repleader; but there are several other pleas on the record; and if one out of several pleas traverses immaterial matter in the declaration, and the defendant pleads other material matters, which are disposed of on proper issues raised upon them, the reasons for a repleader cease. For this the case of *Goodburne v. Bowman* (a), which was recognised, with some qualifications, by some of the Judges, in the case of *Collins v. Gwynne*, in Dom. Proc. (b), is an authority, and the case of *Plummer v. Lee* in this Court (c), in which, under similar circumstances, a repleader was awarded, must be considered as overruled. Indeed, it was not disputed in the present case, that if the issue was immaterial, the plaintiff was entitled to judgment non obstante veredicto.

Rule absolute.

(a) 9 Bing. 532; 2 M. & Scott, 700. Scott's N. R. 711; 6 Bing. N. C. 453.

(b) Since reported under the name of *Gwynne v. Burnell*, 1 (c) 2 M. & W. 495.

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TRESPASS for assault and false imprisonment. Pleas, first, not guilty, whereupon issue was joined; secondly, that the plaintiff, before the commission of any of the said trespasses in the declaration mentioned, to wit, on the 16th day of November, A. D. 1839, at the parish of Ashby-de-la-Zouch, in the county of Leicester, with force and arms, one purse of the value of one shilling, and eight pieces of the current gold coin of the realm called sovereigns, of the value of £8, fifty pieces of the current silver coin of the realm called half-crowns, fifty pieces of the current silver coin of the realm called shillings, fifty pieces of the current silver coin of the realm called sixpences, one silver coin called a five shilling piece, one piece of gold coin called a guinea, certain valuable securities, that is to say, two promissory notes each for the payment of £20, and of the value of £20; two promissory notes each for the payment of £10, and of the value of £10; twelve promissory notes each for the payment of £5, and of the value of £5; one pair of earrings, one ring, two silver thimbles, and one snuff-box, of the goods and chattels of one Francis Tunnickliffe, of great value, to wit, of the value of £200, then and there being found, feloniously did steal, take, and carry away, against the peace of our Lady the Queen, her crown and dignity; wherefore the defendants did, at the said time when &c., in the declaration mentioned, to wit, at the parish of Ashby-de-la-Zouch aforesaid, in the county of Leicester aforesaid, give the plaintiff in charge to one Robert Knight, then and there being a headborough and peace-officer of our Lady the Queen, in and for the said parish of Ashby-de-la-Zouch, and then requested the said headborough and peace-officer to take the said plaintiff into his custody, and him safely keep until he could be carried and conveyed, and to carry and convey him, before some or one of the

Feb. 12.

A person purchased, at a public auction, a bureau in which he afterwards discovered, in a secret drawer, a purse containing money, which he appropriated to his own use. At the time of the sale no person knew that the bureau contained anything whatever:—
Held, that if the buyer had express notice that the bureau alone, and not its contents, if any, was sold to him; or if he had no reason to believe that anything more than the bureau itself was sold, the abstraction of the money was a felonious taking, and he was guilty of larceny in appropriating it to his own use. But that if he had reasonable ground for believing that he bought the bureau with its contents, if any, he had a colourable right to the property, and it was no larceny.

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justices assigned to keep the peace of our said Lady the Queen within the said county of Leicester, and to hear and determine divers felonies and misdemeanours committed within the said county of Leicester, to be examined by and before the said justice touching and concerning the premises, and to be further dealt with according to law: and on that occasion he the said Robert Knight did, to wit, at Ashby-de-la-Zouch aforesaid, in the county of Leicester aforesaid, take the plaintiff into his custody, and seized and laid hold of the plaintiff, and a little pulled and dragged him about, and compelled him to go from and out of the dwelling-house of the plaintiff at Ashby-de-la-Zouch aforesaid, and to be conveyed in custody along the said streets and highways at Ashby-de-la-Zouch, to the said lock-up, the same being situate at Ashby-de-la-Zouch aforesaid, in the county of Leicester aforesaid, and a proper and fit, and usual and convenient place in that behalf, and did then imprison, and keep and detain him in the said lock-up, in order that he might be, and until he could be, conveniently carried before such justice as aforesaid, the same being a reasonable time, and detention and imprisonment in that behalf; and did at the expiration thereof, and as soon as conveniently might and could be, convey the plaintiff, and forced and caused him to be conveyed in custody, in and along the said other streets and ways, to the said house in the declaration lastly mentioned, the same being situated in Ashby-de-la-Zouch aforesaid, to and before the Rev. John Piddocke, clerk, then being one of the justices assigned to keep the peace of our said Lady the Queen within and for the said county of Leicester, &c., (the said Rev. John Piddocke then being at the said last-mentioned house), to be examined by and before the said John Piddocke touching and concerning the premises, and to be further dealt with according to law; and detained and imprisoned the plaintiff there a reasonable and convenient time, until he the plaintiff could be

carried before the said John Piddocke as aforesaid: by means of which said several premises, the plaintiff was assaulted, seized, laid hold of, pulled, and dragged about, and forced and compelled, and conveyed, and detained and imprisoned, and kept and detained in prison, at Ashby-de-la-Zouch aforesaid, upon the occasion and for the space of time in the declaration mentioned, the same being a reasonable time for that purpose, and lawful and just for the causes aforesaid; which are the alleged trespasses in the said declaration mentioned, and whereof the plaintiff hath above complained against the defendant: without this, that they the defendants were guilty of the said alleged trespasses, or any or either of them, elsewhere than at the parish of Ashby-de-la-Zouch aforesaid, in the county of Leicester aforesaid. Verification.

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To this plea the plaintiff replied *de injuriâ*, whereupon issue was joined.

At the trial before *Tindal*, C. J., at the last Warwickshire assizes, the following appeared to be the facts of the case.—Messrs. Mammatt and Tunncliffe, who had for some time resided together at Ashby-de-la-Zouch, in the same house, and keeping the same table and servants, in October, 1839, broke up their establishment, and sold their furniture (which was partly joint, and partly separate property) by public auction. At that sale the plaintiff, who was a shoe-maker also residing in Ashby, became the purchaser, at the sum of 1*l.* 6*s.*, of an old secretary or bureau, the separate property of Mr. Tunncliffe. The plaintiff kept the bureau in his house, and on the 18th of November following, he sent for a boy of the name of Garland, a carpenter's apprentice, to do some repairs to the bureau. Whilst Garland was so engaged, he remarked to the plaintiff that he thought there were some secret drawers in the bureau, and, touching a spring, he pulled out a drawer which contained a quantity of writings. The plaintiff then discovered another drawer, in which was a purse contain-

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ing several sovereigns and other coins, and under the purse a quantity of bank-notes (a). Of this property the plaintiff took possession, and telling Garland that the notes were bad, he opened the purse, and gave him one of the sovereigns, at the same time charging him to keep the matter secret. Garland being interrogated by his parents how he came by the possession of the sovereign, the transaction transpired; and it being subsequently discovered that the plaintiff had appropriated the property to his own use, falsely alleging that he had never had possession of a great portion of it, the defendants (one of whom was the solicitor of Mr. Tunncliffe) went with a police officer to the plaintiff's house, took him into custody, and conveyed him before a magistrate, on a charge of felony. The plaintiff was ultimately discharged, the magistrate doubting whether a charge of felony could be supported. At the trial, a witness of the name of Hannah Jenkins was called on behalf of the plaintiff, who deposed that she was present at the auction, and remembered the piece of furniture in question being put up for sale and bought by the plaintiff: that after it was sold, an observation was made by some of the bystanders, to the effect that the plaintiff might have bought something more than the bureau, as one of the drawers would not open: upon which the auctioneer said—"So much the better for the buyer;" adding, "I have sold it with its contents, and it is his." This statement was opposed by the evidence of the auctioneer, who stated, on cross-examination by the defendant's counsel, that there was one drawer which would not open, and that what he had said was, "That is of no consequence, I have sold the secretary, and *not* its contents." It did not appear that any person knew that the bureau contained anything whatever.

The learned Chief Justice, in summing up, told the jury, that as the property had been delivered to the plaintiff,

(a) The contents of the bureau are set forth in the plea.

as the purchaser, he thought there had been no felonious taking; and left to them the question of damages only; reserving leave for the defendant to move to enter a nonsuit. The jury found a verdict for the plaintiff, with £50 damages.

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In Michaelmas Term, *Whitehurst* obtained a rule to shew cause why the verdict should not be set aside, and a nonsuit entered, or a new trial had.

Hill and *Humfrey* shewed cause at the present sittings (Feb. 10). If the testimony of the witness, Hannah Jenkins, was true, it is clear that the plaintiff had a colourable right to whatever property might be contained in the bureau, and that he was not guilty of a larceny in retaining it. It should therefore have been left to the jury to say whether or no they believed her statement. And if the Court should be of opinion, that, rejecting her evidence, the plaintiff has been guilty of a felony, there ought to be a new trial, and not a nonsuit. But assuming the account given by the auctioneer of what passed at the sale to be correct, still it is submitted that no felony was proved. On what legal ground can this transaction be said to constitute a felony? Unless it include a trespass, it is no larceny. Take the case of a carrier to whom a parcel is delivered; there the possession of the bailee being lawful, (as it was in the present case,) no subsequent misappropriation can make him guilty of a larceny. It amounts to no more than a breach of trust. So in the case of a servant who has possession of his master's property, and goes beyond his charge. To constitute larceny, the original possession must be illegal; whereas here the bureau and its contents were delivered to the plaintiff as his own property. [*Parke, B.*—There is this fact: he opens a purse which belongs to another, which is analogous to the case of a carrier who breaks open a parcel.] In *Cartwright v. Green (a)*, a bureau was delivered, for the purpose of

(a) 8 Ves. 405.

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repairs, to a person, who discovered money in a secret drawer, which he converted to his own use; that was held to amount to a felony, and upon that ground a demurrer to a bill of discovery was allowed. The grounds, however, of that decision are very material to the consideration of the present case. In delivering judgment, Lord *Eldon* said—"To constitute felony, there must of necessity be a felonious taking. Breach of trust will not do. But from all the cases in *Hawkins*, there is no doubt, this bureau being delivered to the defendant for no other purpose than repair, if he broke open any part which it was not necessary to touch for the purpose of repair, but with an intention to take and appropriate to his own use what he should find, that is a felonious taking, within the principle of all the modern cases, as not being warranted by the purpose for which it was delivered. If a pocket-book containing bank-notes was left in the pocket of a coat sent to be mended, and the tailor took the pocket-book out of the pocket, and the notes out of the pocket-book, there is not the least doubt that is a felony. So if the pocket-book was left in a hackney coach, if ten people were in the coach in the course of the day, and the coachman did not know to which of them it belonged, he acquires it by finding it certainly, but not being entrusted with it for the purpose of opening it, that is a felony according to the modern cases." In the cases mentioned by Lord *Eldon* there was a felonious taking, which is not the case here. [*Parke, B.*—The present is very similar to the case of the pocket-book.] In the present case the plaintiff had a property in the bureau, whereas in those cases, the coat was merely delivered to the tailor to be repaired, and the pocket-book was deposited in the coach for the purpose of conveyance only, and in neither case did any property vest in the party. The present case differs from *Cartwright v. Green* in this respect, that there the person who had possession of the bureau had no right to open the

drawer, it not being necessary for the purpose of the repairs required to be done; whereas here, the plaintiff, having the property in the bureau, had a clear right to open the drawer in which the money was concealed. He could not be guilty of any trespass in so doing. Even assuming that he was bound to return the money to Tunncliffe, which is by no means admitted, it amounts to nothing more than an omission to perform a duty. If the original possession is lawful, when is the felony committed? [*Parke, B.*—Suppose a person finds a cheque in the street, and in the first instance takes it up merely to see what it is: if afterwards he cashes it, and appropriates the money to his own use, that is a felony, though he is a mere finder till he looks at it.] Here there is a *bonâ fide* delivery to the party as his own property. How is Tunncliffe in possession of the property found, so as to maintain trespass? It *never* was in fact in his possession, for he knew nothing of its existence.

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Whitehurst, contra.—A larceny is a fraudulent taking of property by a person, with intent to appropriate it to his own use. No doubt there must be a *taking*; and that raises the real question, viz., whether the contents of the bureau were sold with the bureau itself. According to the evidence of the auctioneer, the contents were expressly excepted; but if no mention of any thing it might contain had been made, the sale and delivery of the bureau could not be a delivery of the purse, because no person was aware of its being there. [*Parke, B.*—There certainly was no intention to sell this property; it seems to be a mere case of finding.] There is no good ground for saying that trespass might not have been maintained here: the possession would follow the right of property. Suppose my rails are on another's land, and he finding them there, removes them to a convenient distance; that is no trespass; but if he takes them, and makes use of them on his own

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land, the right of property draws to it the possession, and trespass may be maintained against him. In the case mentioned by Lord *Eldon*, of a pocket-book left in a hackney coach, the property is left in the care only of the coachman, and the right of possession still remains in the owner. And in the case of the coat sent for repair, there is no intention to entrust the tailor with the pocket-book. The present case is not distinguishable; and with respect to the intention in retaining the property, that is a question for the jury, and is to be collected from a variety of circumstances. Here the intention of the plaintiff to convert the money to his own use was clear.

PARKE, B.—In this case there was clearly no *bailment*, because there was no intention to part with the property in question. It amounts, therefore, only to a finding, and comes within the modern decisions on that subject. It is a matter fit for our serious consideration; and we will speak to the Chief Justice before we deliver our judgment. No doubt the same evidence is necessary in the present case, as would be required to support an indictment.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—My Lord Chief Justice thought in this case that, even assuming the facts of which evidence was given by the defendant to be true, the taking of the purse and abstracting its contents was not a larceny; and that is the question which he reserved for the opinion of the Court, giving leave to move to enter a nonsuit. After hearing the argument, we have come to the conclusion that, if the defendant's case was true, there was sufficient evidence of a larceny by the plaintiff: but we cannot direct a nonsuit, because a fact was deposed to on the part of the plaintiff

which ought to have been left to the jury, and which, if believed by them, would have given a colourable right to him to the contents of the secretary, as well as to the secretary itself; viz. the declaration of the auctioneer, that he sold all that the piece of furniture contained, with the article itself: and then the abstraction of the contents could not have been felonious. There must, therefore, be a new trial, and not a nonsuit.

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But if we assume, as the defendant's case was, that the plaintiff had express notice that he was not to have any title to the contents of the secretary if there happened to be any thing in it, and indeed without such express notice if he had no ground to believe that he had bought the contents, we are all of opinion that there was evidence to make out a case of larceny.

It was contended that there was a delivery of the secretary, and the money in it, to the plaintiff as his own property, which gave him a lawful possession, and that his subsequent misappropriation did not constitute a felony. But it seems to us, that though there was a delivery of the *secretary*, and a lawful property in it thereby vested in the plaintiff, there was no delivery so as to give a lawful possession *of the purse and money*. The vendor had no intention to deliver it, nor the vendee to receive it; both were ignorant of its existence: and when the plaintiff discovered that there was a secret drawer containing the purse and money, it was a simple case of finding, and the law applicable to all cases of finding applies to this.

The old rule (a), that "if one lose his goods and another find them, though he convert them *animo furandi* to his own use, it is no larceny," has undergone in more recent times some limitations; one is, that if the finder knows who the owner of the lost chattel is, or if, from any mark upon it, or the circumstances under which it is found, the

(a) 3 Inst. 108.

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owner could be reasonably ascertained, then the fraudulent conversion, *animo furandi*, constitutes a larceny (a). Under this head fall the cases where the finder of a pocket-book with bank-notes in it, with a name on them, converts them *animo furandi*; or a hackney coachman, who abstracts the contents of a parcel which has been left in his coach by a passenger (b), whom he could easily ascertain; or a tailor who finds, and applies to his own use, a pocket-book in a coat sent to him to repair by a customer, whom he must know (c): all these have been held to be cases of larceny; and the present is an instance of the same kind, and not distinguishable from them. It is said that the offence cannot be larceny, unless the taking would be a trespass, and that is true; but if the finder, from the circumstances of the case, must have known who was the owner, and instead of keeping the chattel for him, means from the first to appropriate it to his own use, he does not acquire it by a rightful title, and the true owner might maintain trespass: and it seems also from *Wynne's case*, that if, under the like circumstances, he acquire possession, and mean to act honestly, but afterwards alter his mind, and *open* the parcel with intent to embezzle its contents, such unlawful act would render him guilty of larceny.

We therefore think that the rule must be absolute for a new trial, in order that a question may be submitted to the jury, whether the plaintiff had reason to believe that he bought the contents of the bureau, if any, and consequently had a colour of right to the property.

Rule absolute for a new trial.

(a) Russell on Crimes, 102.

(c) *Cartwright v. Green*, 8 Ves.

(b) *Wynne's Case*, Leach, C. C. 405.

413; 2 East, P. C. 664.

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ASSUMPSIT.—The first count of the declaration stated, that before the making of the promise and undertaking of the defendant thereafter mentioned, and before the making of the indenture of assignment thereafter also mentioned, the defendant had become and was indebted to the plaintiffs in the sum of 440*l.* 0*s.* 5*d.*, and as a security for the payment thereof had deposited with the plaintiffs a certain indenture of lease, whereby a certain messuage and premises, with the appurtenances, situate &c., was demised to the defendant for a certain term of years therein mentioned, and had also indorsed and delivered to the plaintiffs certain bills of exchange (describing them), of which those firstly and secondly mentioned, at the time of the making of the said promise thereafter mentioned, had been dishonoured, and then remained due and unpaid in the hands of the plaintiffs: and whereas also, after the defendant had so become indebted to the plaintiffs as aforesaid, and before the making the promise by the defendant as thereafter mentioned, to wit, on the 18th day of June, 1836, by a certain indenture then made between the defendant of the first part, John Bradbury and Augustus Cherrill of the second part, and the plaintiffs and other the creditors of the defendant who should duly execute the same of the third part, purporting to be an assignment of the estate and effects of the defendant to the said J. Bradbury and A. Cherrill for the benefit of the creditors of the defendant, the defendant assigned to the said J. Bradbury and A. Cherrill all his stock in trade and other personal estate whatsoever, upon trust, among other things, to pay the clear proceeds arising from the sale

By the release of a debt by a composition deed, the creditor loses also the right to retain a written instrument deposited with him by the debtor as a security for the debt. Therefore, the relinquishment of such security, for the benefit of the debtor, forms no consideration for a parol promise by the debtor to pay the residue of the debt, beyond the amount of the composition received under the deed.

(*a*) This case was decided in Hilary Term (Jan. 30), but was unavoidably deferred.

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thereof unto and amongst all the creditors of the defendant, in rateable proportions according to the amount of their respective debts; in consideration whereof, the plaintiffs, parties to the said indenture, did release and discharge the defendant of and from his said debt: and whereas also, before the making of the promise of the defendant as thereafter mentioned, the plaintiffs had duly executed the said indenture of assignment, as parties thereto of the third part: and whereas also, heretofore, and before &c., to wit, on the 1st day of August, 1836, the defendant applied to and requested the plaintiffs to relinquish and give up to Messrs. J. & C. Ling & Co., of &c., but for the benefit and advantage of the defendant, all right, estate, claim, and advantage whatsoever of them the plaintiffs in and to the said messuage and premises, which the plaintiffs then consented to do in consideration of the promise of the defendant thereafter mentioned: And thereupon afterwards, to wit, on &c., in consideration that the plaintiffs, at the request of the defendant, would relinquish and give up all the estate and interest that they had in the said lease of the messuage and premises aforesaid, in favour of the said Messrs. J. & C. Ling, for the benefit and advantage of the defendant, the defendant undertook and then promised the plaintiffs to pay them any deficiency that might arise to them upon his, the defendant's, aforesaid debt, after they should have received the dividend of his estate under his aforesaid assignment for the benefit of his creditors, and such other sums as they might receive for the securities they might hold.—The declaration then averred, that the plaintiffs, confiding, &c., did relinquish and give up all the estate and interest which they had in the lease in favour of Messrs. Ling, whereof the defendant had notice; and that under the assignment, and upon the securities which the plaintiffs held, to wit, the aforesaid bills of exchange, they have received certain sums of money amounting to

279*l.* 12*s.* 4*d.*, and that no further dividend is payable or to be paid under the said assignment, or upon the aforesaid securities, of all which the defendant had notice: and assigned a breach in non-payment by the defendant of the balance remaining due upon the plaintiffs' debt, viz. 160*l.* 8*s.* 1*d.*.—There was also a count on an account stated.

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The defendant pleaded non-assumpsit, and several other pleas, of which the fourth (to the first count) was as follows:—That there never was at any time any value or consideration between the plaintiffs and the defendant moving in that behalf, nor did the plaintiffs ever give, or the defendant ever receive, any value or consideration for the making by the defendant of the said supposed promise in the first count mentioned, except the supposed consideration in the said first count mentioned. And the defendant further says, that after the depositing by the defendant with the plaintiffs of the said indenture of lease in the declaration mentioned, as a security for the repayment by the defendant to the plaintiffs of the said debt of 440*l.* 0*s.* 5*d.*, and whilst the same was then due and payable to the plaintiffs, and before the supposed consideration for the making of the defendant's promise in the first count mentioned, and whilst the said indenture of lease was in the hands of the plaintiffs as aforesaid, and before the commencement of this suit, to wit, on the said 18th day of June, 1836, the plaintiffs, by a certain indenture sealed with their respective seals, and now shewn to the Court here, for the considerations therein mentioned, did thereby acquit, release, and for ever discharge the defendant of and from all manner of debt and debts, sum and sums of money, bills, bonds, notes, accounts, reckonings, judgments, executions, action and actions, suit and suits, claims, demands, costs, charges, damages, and expenses whatsoever, which they the plaintiffs, or either of them, their or either of their partner or partners, then had or ever had, or could, should, or might at any time hereafter have, claim,

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challenge, or demand of, from, or against the defendant, his executors or administrators, or his, their, or either of their lands or tenements, goods or chattels, from the beginning of this world to the day of the date of the last-mentioned indenture; as by the said last-mentioned indenture, reference being thereunto had, will more fully appear. And the defendant further saith, that the said debt of 440*l.* 0*s.* 5*d.*, was (amongst others) then released by the plaintiffs to the defendant in manner and form as above mentioned.—Verification.

Special demurrer, assigning for causes, that the defendant, in the said plea, neither denies the making of the promise by him as the plaintiffs have in the first count alleged, nor alleges any matter in confession and accordance thereof; neither does the defendant allege any matter whereupon the plaintiffs can take a certain and positive issue: that the defendant, in the said plea, attempts argumentatively to put in issue the legality and sufficiency of the consideration upon which the defendant made the promise in the first count alleged: that although the defendant, in the said plea, hath alleged that the plaintiffs, in and by the said indenture of the 18th of June, 1836, released the defendant of and from all and all manner of debts and demands due from the defendant to the plaintiffs, and that the debt so due as in the first count mentioned was thereby released, yet the defendant hath not alleged that the plaintiffs, by the said indenture, released the interest which they had acquired in the said indenture of lease, by the same having been deposited with them by the defendant as in the first count alleged; and that the defendant, in the said plea, attempts to shew argumentatively that the said indenture of the 18th of June, 1836, operated as a release of the interest that the plaintiffs had acquired by the deposit of the said indenture of lease with them by the defendant, as in the first count alleged.—Joinder in demurrer.

The following points were marked for argument on the part of the defendant:—1. That the declaration is bad as disclosing a fraudulent transaction, by which the plaintiffs, after receiving the full dividend on their debt by virtue of the composition deed, were to secure a further advantage to themselves, by being paid in full, to the prejudice of the general body of the defendant's creditors. 2. That the declaration discloses no consideration for the defendant's promise, inasmuch as it is stated in the declaration that the plaintiffs released the debt for which they held the lease, and then all right of holding it on the part of the plaintiffs was gone. 3. That there also is no consideration for the said promise, on the ground that the plaintiffs were paid in full, in contemplation of law, by receiving the said dividend, all claim which they had on the said lease.

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The case was argued on a former day (Jan. 25) by

Humfrey in support of the demurrer.—First, the declaration is good. It does not appear that the agreement between the plaintiffs and the defendant was in fraud of the other creditors. If the creditors were made aware of it, it was good in law. There might be a good consideration for the creditors permitting another to receive more in proportion than they.

Secondly, the plea is bad. No issue can be taken upon it. What could the plaintiff reply to it? The deed stated in the plea is the very deed set out in the declaration. The plaintiff could not say there is no such deed, for he has averred it in his declaration, as part of the consideration in respect of which he sues. Suppose he took issue on the averment that there was no consideration for the defendant's promise *except* the supposed consideration mentioned in the declaration; that would be a wholly immaterial issue. [*Parke, B.*—The question arises upon the declara-

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Erle, contrà.—The question in this case is, whether, a debtor having deposited with a creditor a deed as a security for his debt, and having afterwards compounded with that and other creditors, the payment of such composition is not a consideration for the giving up of the deed by the creditor. The promise alleged in the declaration is, that the defendant will pay the plaintiffs the remainder of their debt, beyond what they have received under the composition deed. Where is the consideration for that promise? What right had the plaintiffs to retain these securities for their debt, after an absolute release by them of the debt itself? The debt is released in toto, for good consideration, viz. the payment of the composition stipulated for in the deed. [*Parke*, B.—No doubt, if there has been actual satisfaction, the plaintiffs' claim is altogether at an end: the question is, whether a release has the same effect.] A release is just as operative to destroy the debt as satisfaction. [*Parke*, B.—To make the declaration bad, you must say that all right and title to the possession of the securities is gone by the composition; and that the debtor could have recovered them in trover.] It is submitted that he could. If the debt had been *paid*, it must be conceded that he could; and if it be released for value received from a third party, is it not the same? The debt is released and gone, therefore the creditor's qualified right to hold the deed as a security for it, is gone also. Is it less so, because the consideration is a composition, which is not a satisfaction to the full amount? The legal effect of the release cannot depend on the amount of the consideration. It was possible that under the deed of composition the whole debt might have been paid; how then could the effect of the absolute release contained in the deed depend on the amount which is ultimately realised afterwards?

Suppose a third party had given security for the debt; if the creditor released to the principal debtor, and did not obtain his full debt, could he still hold the surety liable? There are indeed cases, running near the present, where a creditor has been allowed to resort to securities remaining in his hands, notwithstanding a release in a composition deed; but that is where he has specially reserved the right to do so: as in *Duffy v. Orr* (a), where the creditor added to his signature to the composition deed the words—"without prejudice to any securities whatever that I hold;" and the other creditors signed it afterwards. But the effect of a legal instrument cannot be altered by the mere understanding of the parties.

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But further, the agreement for full payment of the plaintiffs' debt was a fraud on the other creditors parties to the composition deed, and therefore could not form any consideration: *Lewis v. Jones* (b). There are cases where a subsequent promise or security has been sued on, but that is where it has been under seal; a subsequent promise, not under seal, to pay the remainder of the debt, is nudum pactum: *Ex parte Hall* (c).

Humfrey, in reply.—The question is, whether the agreement contained in the composition deed is such as bound the plaintiffs to give up the securities they at that time held for their debt. The plaintiffs had a right to retain them in order to reduce their debt. If they could, by selling the lease, reduce the amount of their debt, they had a right to do so. *Thomas v. Courtney* (d) is an authority for the plaintiffs. There the creditors of an insolvent agreed, by an instrument not under seal, to accept in full satisfaction of their debts 12s. in the pound payable by instalments, and to release him from all demands. One of

(a) 5 Bligh, N. S. 620; 1 Clark & Fin. 253.

(c) 1 Deac. B. C. 171.

(d) 1 B. & Ald. 1.

(b) 4 B. & Cr. 506.

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the creditors who signed for the whole amount of his debt, held at the time, as a security for part, a bill of exchange drawn by the debtor and accepted by a third person; and the money due thereon was afterwards paid by the acceptor. It was held that the creditor might retain the bill, the agreement for composition not containing any stipulation for giving up securities, and the effect of it not being to extinguish the original debt. It must be contended on the other side, that the instant the composition deed was signed, every security held by the plaintiffs could have been recovered by the defendant in an action of trover. It would be for the benefit of the creditors generally, that the plaintiffs should reduce their debt by means of this security, which was not intended to be given up, and therefore they have a right to retain it. [Lord Abinger, C. B.—In *Thomas v. Courtney*, the Court thought there was no release of the debt itself.]

Cur. ad. vult.

The judgment of the Court was delivered on the 30th of January by

PARKE, B.—The declaration in this case states, that in consideration that the plaintiffs would deliver up a lease held by them as a security for a debt due to them by the defendant, and from which it is contended the defendant had previously been released by force of a composition deed executed by the plaintiffs, he promised to pay them the balance of their debt, which should remain due after the stipulated dividend had been paid, and should not have been previously realised by other securities. To this the defendant pleaded a plea setting out the composition deed, and describing it as a general release of all debts whatever due from him to the plaintiffs from the beginning of the world to the date of the instrument; and the objection made in the case arises on the declaration,

namely, that by force of that deed the plaintiffs' debt having been previously released, they were no longer entitled to hold the indenture of lease as a deposit to secure repayment, and consequently that their giving up the latter could form no consideration for a promise by the defendant to pay the balance due on that debt. On looking into the authorities, we find that the law is so. In *Sheph. Touchst.* p. 342, it is thus laid down:—"By a release of all debts, are discharged and released all debts then owing from the releasee to the releasor upon especialties or otherwise, all debts also due upon statutes. And therefore if the conusor himself, or his land, be in execution for the debt, and he hath such a releasc, he must be discharged." And Mr. Preston adds—"For, by releasing the debt, the security for the debt is released." That authority is precisely in point. Here is a release of the debt, the consequence of which is, that the party releasing has no right to hold the collateral security which was deposited with him; for, looking at the form of the release, it must not be understood simply to release the *right of action* on the debt, but the *security* also. The debt is released, and consequently as much gone in point of law as if it had been satisfied; and as the plaintiffs had no right to hold the security for it afterwards, so they had no right to make the giving up of that security the consideration of a promise by the defendant, and consequently the present action cannot be maintained. The judgment must therefore be for the defendant.

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Judgment for the defendant.

MEMORANDA.

IN this Vacation, Mr. Justice *Littledale* resigned his seat in the Court of Queen's Bench, which he had occupied since Easter Term, 1824. He was succeeded by

William Wightman, Esq., of Lincoln's Inn, who was first called to the degree of Serjeant at Law, and gave rings with the motto *Æquam servare mentem* : and shortly afterwards received the honour of knighthood.

Sir *Joseph Littledale* was, a few days after his resignation, sworn of her Majesty's Privy Council.

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PRINCIPAL MATTERS.

ACCORD AND SATISFACTION

With one of several Plaintiffs.

To an action by three plaintiffs for a joint demand, the defendant pleaded an accord and satisfaction with one of the plaintiffs, by a part payment in cash and a set-off of a debt due from that one to the defendant:—*Held*, that the plea was good, without alleging any authority from the other two plaintiffs to make the settlement. *Wallace v. Kelsall*, 264

ACTION ON THE CASE

For continuing Nuisance.

Action on the case for continuing a nuisance to the plaintiff's market, by a building which excluded the public from a part of the space on which the market was lawfully held. It appeared that the building was erected in October 1838, under the superintendence and direction of the defendants, not on their own land, but on that of the corporation of K. (of which corporation they were members). The Earl of L. was the owner of the market in October 1838, and, in February 1839, he demised it to the plaintiff; and the market being afterwards obstructed by the building, this action was brought:—*Held*, that the defendants were liable for continuing the nuisance, although they had no

right to enter upon the land to remove it, and that the action was therefore maintainable. *Thompson v. Gibson*, 456

AFFIDAVIT.

See ARREST, (2).

JURY.

(1.) *Jurat.*

A rule obtained on an affidavit the jurat of which is without date, will hereafter be discharged *with costs*. *Blackwell v. Allen*, 146

(2.) *Under 1 & 2 Vict. c. 110, s. 3.*

Where an order is obtained for a *capias* under the 1 & 2 Vict. c. 110, s. 3, before the suing out of the writ of summons, the affidavit on which it is applied for need not be entitled in the cause. *Schletter v. Cohen*, 389

AMENDMENT.

Under 3 & 4 Will. 4, c. 42, s. 23.

Declaration on a promissory note for £250, made by the defendant, dated the 9th of November 1838, payable to the plaintiffs or their order on demand. Plea, that the defendant did not make the note. The proof at the trial was of a joint and several promissory note for £250, made by the defendant and his wife, dated the 6th of November 1837, payable twelve months after date. There

was no proof of any other note between the parties:—*Held*, that this was a variance properly amended at *Nisi Prius*, under the 3 & 4 Will. 4, c. 42, s. 23. *Beckett v. Dutton*, 157

ARBITRATION.

(1). *Arbitrator's Authority.*

A cause was referred at *Nisi Prius*, and a verdict entered for the plaintiff by consent, for the damages in the declaration, which exceeded the amount claimed in the particulars of demand. The arbitrator awarded that the verdict should stand at the amount for which it was entered:—*Semble*, that the particulars of demand were not necessarily before the arbitrator, and that if the defendant intended to limit the plaintiff's demand to the amount claimed by the particulars, he ought to have brought the particulars before the arbitrator. *Kenrick v. Phillips*, 415

(2). *Enlargement of Time for Award.*

The Court has power, under the stat. 3 & 4 Will. 4, c. 42, s. 39, to enlarge the time for an arbitrator to make his award, where the arbitrator, having power to do so, has allowed the time limited by the submission for making the award to elapse without doing so. *Parbery v. Newnham*, 378

(3). *Award.**Inconsistency.*

In debt for use and occupation, goods sold, &c. to which the defendant pleaded *nunquam indebitatus* and a set-off, the verdict was entered at *Nisi Prius* for the plaintiff, subject to a reference of the cause to an arbitrator, who was to certify whether the verdict should stand, and for what amount, or whether it should be vacated, and a verdict entered for the defendant. The arbitrator certified that the verdict should be vacated, and a verdict entered for the defendant on both issues:—*Held*, that he had a right to do so, and that the certificate

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was not inconsistent. *Williams v. Mouldsdale*, 134

(4). *Attachment for Non-payment of Money awarded.**Demands, when sufficient.*

Where an arbitrator, to whom a cause was referred, awarded that the action should cease, and that a sum of money should be paid by the plaintiff to the defendant; and the defendant's costs having been taxed, both sums were demanded of the plaintiff:—*Held*, that, inasmuch as the arbitrator had exceeded his authority in directing payment of the sum of money to the defendant, an affidavit which stated that the defendant demanded of the plaintiff the said sum of money, and also the amount of the costs, but that the plaintiff did not pay the same, or *any part thereof*, was not sufficient to ground an attachment. *Poyner v. Hatton*, 211

ARREST.

(1). *Order under 1 & 2 Vict. c. 110, by whom to be made.*

An application for an order under 1 & 2 Vict. c. 110, s. 3, for a *capias* to issue against a defendant, cannot be made to *the Court* at Westminster, but it may be made to a single Judge sitting there. *Bentley v. Berrey*, 146

(2). *Capias under 1 & 2 Vict. c. 110, s. 3. Into County Palatine.*

A *capias* may be issued under the stat. 1 & 2 Vict. c. 110, s. 3, into a county palatine, to be executed in that county, although it be indorsed for a less sum than £50. *Brown v. M'Millan*, 196

ATTORNEY.

(1). *Delivery of Bill.*

It is not necessary that an attorney plaintiff should deliver a signed bill of costs a month before action brought, where the defendant has been admitted an attorney after the bill became due,

but before the commencement of the action. *Windsor v. Herbert*, 375

(2). *Costs of Taxation of Bill.*

After the death of the plaintiff in an action, his executrix obtained an order for referring the bill of the plaintiff's attorney to taxation. Less than a sixth having been taxed off:—*Held*, that the executrix was liable to the costs of the taxation. *Jefferson v. Warrington*, 137

BANKRUPTCY.

(1). *Operation of 2 & 3 Vict. c. 29.*

1. Where a trader commits an act of bankruptcy by procuring his goods to be taken into execution with intent to defeat or delay creditors, the execution, although levied bonâ fide by the judgment creditor, is not protected by the stat. 2 & 3 Vict. c. 29. *Hall v. Wallace*, 353

2. The statute 2 & 3 Vict. c. 29, s. 2, does not apply to a case where the assignees in bankruptcy were appointed before its passing. *Moore v. Phillips*, 536

(2). *Order and Disposition.*

Assignees of a bankrupt cannot recover in trover a policy of insurance on life, effected by the bankrupt, and deposited by him, before his bankruptcy, with the defendants, as a security for money then and previously advanced by them to him.

An instrument so deposited is not in the order and disposition of the bankrupt, with the consent of the true owner, within the meaning of the stat. 6 Geo. 4, c. 16, s. 72. *Gibson v. Overbury*, 555

BILLS AND NOTES.

See PLEADING, II. (3); III. (1), (2), (4).

(1). *Promissory Note, what is.*

An instrument was in the following terms—"I undertake to pay to R. I.

the sum of 6l. 4s. for a suit of, ordered by D. P.:"—*Held*, that it was not a promissory note; but good as a guarantee, as the consideration could be collected by necessary inference from the instrument itself. *Jarvis v. Wilkins*, 410

(2). *Indorsement by Acceptor after Satisfaction of Bill, Effect of.*

The drawer of a bill of exchange, before it became due, agreed with the acceptor, that on his giving a certain mortgage security for the amount, he, the drawer, should deliver up to him the bill of exchange as discharged and fully satisfied. The acceptor accordingly executed the mortgage, and received back the bill, uncanceled:—*Held*, that the drawer was liable on the bill to a party to whom the acceptor afterwards indorsed it for value, before it became due.

A plea, in such action, that the bill was paid by the acceptor before it became due, and afterwards re-issued by him without any new stamp, can be supported only by proof of actual payment in cash, and not by evidence of any arrangement between the drawer and acceptor, whereby the bill was treated as being satisfied. *Morley v. Culverwell*, 174

(3). *Notice of Dishonour.*

1. A bill of exchange having been drawn upon A. B., was accepted by him, and was afterwards indorsed by the drawer to the plaintiffs, who indorsed it to the Birmingham and Midland Counties' Bank, who indorsed it to one W. The bill having been dishonoured when due, W. gave notice of it to the bank, who gave notice to the plaintiffs, one of whom wrote the following letter to the drawer:—"Dear Sir,—To my surprise, I have received an intimation from the Birmingham and Midland Counties' Bank, that your draft on A. B. is dishonoured—
x x 2

ed, and I have requested them to proceed on the same:"—*Held*, that if there was more than one bill to which the letter could apply, it lay upon the defendant to prove that fact, in order to shew its uncertainty.

Held, also, that the letter was a good notice of dishonour. *Shelton v. Braithwaite*, 436

2. In an action by the indorsee against the drawer of a bill of exchange, it is enough for the plaintiff to shew, to the satisfaction of the jury, that the letter containing the notice of dishonour was posted in such time as that by the due and usual course of the post, it would be delivered upon the proper day.

The post-office mark is not conclusive of the time when the letter was posted. *Stocken v. Collier*, 515

(4). *Actions on.*

1. *Pleadings.*

In assumpsit by the indorsee against the acceptor of a bill of exchange, the declaration, after stating that the bill was not paid, although duly presented on the day when it became due, alleged that the defendant *afterwards*, to wit, on the day and year last aforesaid, promised the plaintiff to pay him the said bill *according to the tenor and effect of his said acceptance*:—*Held*, sufficient on special demurrer, as amounting, after the bill became due, to a promise to pay on request. *Christie v. Peart*, 491

2. *Debt, when maintainable.*

Debt is maintainable on a bill of exchange by indorsee against his immediate indorser. *Watkins v. Wake*, 488

BOND.

See GUARANTEE.

STAMP.

BREACH OF PROMISE OF MARRIAGE.

See PLEADING, II. (6).

COMPOSITION DEED.

CANAL ACT.

Where a canal act enacted, in one clause, that after any land should have been set out and ascertained for making the canal, &c., it should be lawful for all persons seised or possessed of or interested in such lands, to contract for, sell, and convey them to the canal company, and that all such contracts, sales, and assurances should be valid and effectual in law, and all such contracts, &c. should be made at the expense of the company, and *enrolled* with the clerk of the peace, and copies thereof, signed by the clerk of the peace, should be evidence: and a subsequent clause enacted, that upon payment of such sum or sums of money as should be contracted or agreed for between the parties, or determined and adjusted by the commissioners, or assessed by a jury *in manner thereinbefore mentioned*, the lands should be vested in the company:—*Held*, that, by reference to the former clause, the contract, in order to vest the lands in the company, must be *in writing*; and that, therefore, proof of payment by the company, for particular lands identified in evidence, was not sufficient proof of title in the company. *The Earl of Harborough v. Shardlow*, 87

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COMPOSITION DEED.

Effect of Release in.

By the release of a debt by a composition deed, the creditor loses also the right to retain a written instrument deposited with him by the debtor as a security for the debt. Therefore, the relinquishment of such security, for the benefit of the debtor, forms no con-

sideration for a parol promise by the debtor to pay the residue of the debt, beyond the amount of the composition received under the deed. *Cowper v. Green*, 633

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See COSTS, (3).

COSTS.

See PAUPER.

(1). *Operation of 3 & 4 Vict. c. 24, s. 2.*

1. An action on the case for the infringement of a patent, is within the operation of the 3 & 4 Vict. c. 24, s. 2; and notwithstanding the provisions of the stat. 5 & 6 Will. 4, c. 83, s. 3, the plaintiff, recovering only nominal damages, cannot have his full costs, or treble costs, without a certificate under the former act.

And the Court held, that, after the taxation, the Judge had no power to grant such certificate. *Gillett v. Green*, 347

2. On the 27th of June, 1840, a plaintiff in trespass obtained a verdict with 1s. damages, leave being reserved to the defendant to move to enter a nonsuit. The Judge, on being applied to certify under 43 Eliz. c. 6, s. 2, to deprive the plaintiff of costs, declined doing so until the motion for a nonsuit should have been disposed of. On the 3rd of July following, the statute 3 & 4 Vict. c. 24, came into operation. No motion for a nonsuit having been made, the Judge, on the 9th of November, granted the certificate:—*Held*, that the certificate was null and void. *Morgan v. Thorne*, 400

(2). *On Discontinuance after new Trial granted.*

Where the defendant had a verdict on one of two issues in a cause, and the plaintiff on the other issue, and the defendant obtained a rule for a new trial on the latter issue, on the ground of misdirection, whereupon the plaintiff

discontinued:—*Held*, that the defendant was not entitled to the costs of the trial. *The Earl of Macclesfield v. Bradley*, 570

(3). *Double Costs to Constable.*

Where a constable, appointed under the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 76, is sued for an act done in the exercise of his general duty as a constable, and the plaintiff discontinues, the defendant is entitled to double costs under the 21 Jac. 1, c. 12, s. 5, and not merely to costs as between attorney and client, under the 5 & 6 Will. 4, c. 76, s. 133. *Maberly v. Titterton*, 540

(4). *When taxable on reduced Scale.*

Where a plaintiff claims more than £20, but obtains a verdict for a sum under £20, by reason of a tender of the remainder of the amount claimed before action brought, his costs must be taxed on the reduced scale applicable to the recovery of a sum under £20. *Dixon v. Walker*, 214

COURT OF EXCHEQUER,
(PRE-AUDIENCE IN).

The Attorney-General, in the Queen's business, has pre-audience in the Court of Exchequer over the Postman and Tubman. *Regina v. The Bishop of Exeter*, 188

COVENANT.

For Repair by Underlessee, Liability on.

A. leased premises to B., from the 25th of March, 1823, for sixteen years wanting ten days, and B. covenanted with A. to keep the premises in repair, and to paint once in every five years of the term, and to leave the premises in repair. B. underleased the premises to C., from the 24th of June, 1834, for four years and three quarters wanting eleven days, and C. covenanted with B. to keep the premises in repair

(the covenant so far being in the same terms as in the original lease), and to paint once during the term, and to leave the premises in repair. A. sued B. for breaches of this covenant, and B. let judgment go by default, and upon the writ of inquiry the damages were assessed at 64*l.* 10*s.*, being the amount of dilapidations proved by a surveyor, whose estimate had been laid before B. previous to the commencement of the action. B. afterwards sued C. for the amount of the dilapidations, and the costs of the action brought against him. The jury found the amount of the dilapidations to be 57*l.* 10*s.*:—*Held*, that B. was not entitled to recover also the amount of the costs in the former action. *Penley v. Watts*, 601

DAMAGES.

See PLEADING, I. (1).

VENDOR AND PURCHASER.

DEBT.

See BILLS AND NOTES, (4), 2.

DEVISE.

(1). *Description of Lands devised.*

A testator by his will devised as follows:—"Whereas it appears to me, that one part of my said freehold lands, viz. those lands which I hold in the parishes of W., B., and M., were held for a considerable period of time by my father's ancestors in the male line, bearing the name and arms of D., as hereditary proprietors of the same, I therefore consider it just and equitable that those lands should continue to be held, if possible, by persons of the same name and family. I therefore give, bequeath, and devise, the freehold lands which I hold in the three parishes aforesaid, to" &c. The property which the testator possessed in the parish of M. was freehold, but that in the parishes of W. and B. was all

leasehold, which he had derived from his father's ancestors in the male line:—*Held*, that the leasehold lands in the parishes of W. and B. were sufficiently ascertained by the will, and therefore, though incorrectly described as "freehold," passed under the devise. *Doe d. Dunning v. Cranstoun*, 1

(2). *For Life, or in Fee.*

A testator, after directing that all his debts and funeral expenses should be paid by his executors thereafter named, devised to A. a particular farm, without words of limitation, and other farms to B., C., and D., respectively, in the same terms; and appointed A. and B. joint executors and *residuary legatees* of his will:—*Held*, that A. took a life estate only in the farm devised to her. *Doe d. Roberts v. Roberts*, 382

(3). *Estate Tail.*

A testator, by his will, devised as follows:—"I give my house, gardens, &c., at G., to Mrs. S. S., and her heirs, if she has any child; if not, then, after the decease of herself and her husband, Mr. R. S., I give it to F. M. and her heirs." S. S. had a child, who was living at the date of the will, but who died four days after the date of it, in the lifetime of the testator:—*Held*, that S. S. took an estate tail; and that upon her death without heirs of her body, the property passed to F. M. *Doe d. Jearrad v. Bannister*, 292

(4). *Several Inheritances.*

A testator devised his real estates at B., after the decease of his wife, to J. B., "but at his death the whole to be for J. B.'s wife and children, and which children, at the death of their mother, should inherit the same jointly during their lives; and if the said children should die before they arrived at the age of twenty-one, the testator willed that the estates should go to

H. S., and to the use and benefit of him and his children." J. B. and his wife had five children, one of whom died in the lifetime of the testator, another died after his death under twenty-one, and a third attained twenty-one and died unmarried and intestate. The two surviving children after the death of the testator's widow, and of their parents, executed a disposition under the 3 & 4 Will. 4, c. 74, for barring all remainders in the estates at B.:—*Held*, that these two children took an estate in fee-simple, as tenants in common, in the estates in question. *Spry v. Bromfield*, 545

(5). *Power of Sale to Executors.*

A testator devised among his children (naming them), one half of his property at his decease, whether in houses, lands, or other effects, to be equally divided among them and their heirs, according to the judgment of his executors, whom he empowered to sell or dispose of *the whole or any part*, according to their opinion, for the benefit of his children, as they severally arrived at the age of twenty-five, and not before, unless his executors should think it prudent to divide it before. The testator then gave the remaining half of his property to his wife for her life, and to leave it at her death by her will among his children; but if she made no will, then to be equally divided among his children and their heirs:—*Held*, that the power of sale given to the executors extended only to the moiety first devised among the children and their heirs. *Bragg v. Ryland*, 59

DISCONTINUANCE.

See FINE.

DISTRESS,

What Goods exempt from.

Brewer's casks sent to a public-house with beer, and left there until

the beer is consumed, are liable to be distrained for the rent of the house. *Joule v. Jackson*, 450

EJECTMENT.

See LIMITATION ACT.

Service of Declaration.

Service of a declaration was effected by passing the copy of the declaration and notice under the door of the dwelling-house, the party being in the house at the time, and refusing to open the door, or listen to the explanation given of the object and nature of the service:—*Held*, sufficient. *Doe d. Lowndes v. Roe*, 439

EVIDENCE.

See SHERIFF, (3).

VENUE.

Secondary Evidence—Short-hand Notes—Fine.

Where a deed is in the hands of an attorney, who holds it not merely as attorney, but as a security for money owing to him from his client, and the attorney, being called on a subpoena duces tecum, refuses to produce the deed on the ground of his own lien, the party calling for the production of the deed is entitled to give secondary evidence of its contents.

There are no degrees of secondary evidence; but where a party is entitled to give secondary evidence at all, he may give any species of secondary evidence within his power.

Where, on a former trial of the title to the same property, on an ejectment by the same lessors of the plaintiff against a different defendant, a deed was given in evidence on the part of the defendant, and the limitations in it were stated in Court by the defendant's counsel:—*Held*, that a copy of the short-hand notes of that statement was not receivable in evidence on the part of the same lessors of the plaintiff, in a second ejectment against another party.

Quære, whether such evidence would have been receivable, if the parties to the action had been the same?

Where, in ejectment, evidence was received in favour of the plaintiff which was inadmissible, but all objections and exceptions were reserved for the opinion of the Court above, by the consent of both parties:—*Held*, that the defendant was not entitled to a new trial without payment of costs, on the ground of the reception of this evidence, if the legal evidence admitted shewed the title to be in the lessors of the plaintiff; as, upon such a reservation, the Court are called upon to decide whether the lessors of the plaintiff are entitled to recover or not.

An examined copy of the record of a fine, levied with proclamation, is as good evidence of the fine as the chirograph itself certified by the officer.

A fine was proved to have been levied of the estate in question, in 1790, and the lessors of the plaintiff gave in evidence a deed of conveyance of part of the property in 1802, by the conusor of the fine to a purchaser, which stated that the fine was levied to the use of himself in fee. This deed was received without objection on the part of the defendant:—*Held*, that it was good evidence as a declaration of the uses of the fine, although it was not proved that the defendant derived title under the conusor. *Doe d. Gilbert v. Ross*, 102

EXECUTOR AND ADMINISTRATOR.

Property of Administrator in Goods of Intestate.

L. was possessed of furniture and other property, and on his death, intestate, in 1827, the furniture was removed by his widow to another house, in which she resided, until her death in 1832, with her daughter E., and continued during that period to use

the furniture. In October, 1829, the widow caused the furniture to be valued, in order to her taking out administration to L., which she afterwards did. In 1838, the furniture was sold by the defendant, (who had married another daughter of L.) with E.'s concurrence. In 1840, (disputes having arisen about the distribution of the proceeds), E. took out administration to her mother:—*Held*, that E. could not maintain trover for the furniture, without having taken out administration de bonis non to L. *Elliott v. Kemp*, 306

FINE.

See EVIDENCE.

Discontinuance by.

By a will, in 1789, an estate was devised to A. G. M. for life, with remainder as he should by deed or will appoint, and in default of appointment, remainder to the heirs of his body, with remainders over. In 1790, A. G. M. levied a fine to the use of himself in fee, and afterwards died without issue:—*Held*, in an ejectment by the lessors of the plaintiff, claiming as heirs at law of A. G. M., that the fine created a discontinuance, and gave a tortious fee to A. G. M., and that his heir at law was consequently entitled to recover in ejectment, the remainders over being devested, and the rights of the remaindermen only capable of being enforced by real action.

In such a case the statute 3 & 4 Will. 4, c. 47, s. 38, preserves the right of the remaindermen to bring a formodon. *Doe d. Gilbert v. Ross*, 102

GUARANTEE.

See BILLS AND NOTES, (1).

For Indemnity from Bond.

A declaration in assumpsit stated, that in consideration that R. J. in his lifetime (of whom the plaintiff was administratrix) would execute a bond to W. J. in the penal sum of £600, the

defendant undertook that he would save harmless and indemnify R. J., his executors and administrators, from any loss or damage by reason of his executing the bond: the declaration then averred the execution of the bond by R. J., his death, and the grant of administration to the plaintiff, and that the plaintiff, as administratrix, became liable to pay and satisfy the bond to W. J., of which the defendant had notice; but that the defendant did not indemnify the plaintiff, as such administratrix, from loss or damage, by reason of the execution of the bond; by means whereof the plaintiff, as administratrix, was called upon, and forced and obliged, to pay, and did pay to W. J. the sum of £310, secured by the bond, and a further sum for the costs of an action against her, &c. Plea, that the plaintiff, as administratrix, was not called upon, or forced, or obliged, to pay, nor did she pay to W. J. the monies in the declaration mentioned, nor was she damnified as therein mentioned, in manner and form, &c. The bond, when produced on the trial, appeared to be subject to a condition for repayment of the sum secured, with interest, "at or before the expiration of six months' notice to be given to pay the same:" and there was no proof of such notice having been given. It appeared, however, that the defendant had notice of the action being commenced against the plaintiff on the bond (which was stayed by a Judge's order on payment of debt and costs), and did not come in to defend it:—*Held*, that this was sufficient to entitle the plaintiff to recover on the above issue.

The defendant's undertaking was contained in two letters, addressed to C. J., the brother of the plaintiff's intestate R. J., in the first of which he pressed C. J. to join, and to induce his brothers to join, in a security for the repayment of money to be advanced to the defendant for carrying on a suit in Chancery and in the second he again

urged that they should lend their names for this purpose, and added,—“I should consider it a matter of favour to myself if your brothers will join, and I will see that they come to no harm.” R. J., in consequence, executed the bond in question:—*Held*, that the letters amounted to an *actual guarantee*, on which the defendant was liable to the plaintiff, and not merely to a representation, with a view to the parties doing an act against the consequences of which they should *afterwards* be protected. *Jones v. Williams*, 493

HUSBAND AND WIFE.

Rights of Husband in Property of Wife.

The property in wearing apparel bought for herself by a wife living with her husband, out of money settled to her separate use before marriage, and paid to her by the trustees of the settlement, vests by law in the husband, and it is liable to be taken in execution for his debts. *Carne v. Brice*, 183

INDEBITATUS ASSUMPSIT

For Work and Labour, when maintainable.

R. having undertaken, by a written contract, to build for the Corporation of Henley a house on a farm occupied by A, engaged S. to do the carpenter's work; and the following agreement was made and signed by R. and S., and witnessed by A:—"It having been arranged that A. shall build a new house on the farm occupied by Mr. A., it is hereby agreed and understood between the said R. and S., that S. shall do all the carpenter's work, &c. under the inspection and control of the said A., and that the amount of the said work shall be paid by Mr. A. to S. only, and that this agreement shall be his guarantee for so doing." On the same day, A. wrote to S. as follows:—"It having been agreed that R. shall build a new house on the farm occupied by

me, and that, by an agreement this day shewn me between you and S. you are to do the carpenter's work, &c., and that the payment, when done, is to be made by me to you, and to no other person, according to plan and specification, I hereby undertake to pay the same, by having a proper discharge :"—*Held*, that S., having done the work, could not maintain an action of indebitatus assumpsit for work and labour against A. for the value of it. *Sweeting v. Asplin*, 165

INFANT.

See PROCHEIN AMY.

INSOLVENT.

Arrest of, after Discharge.

Where an insolvent, being arrested after his discharge for a new debt, agreed, on A.'s becoming his bail, to give him a bond for £300, in which amount was included a debt of £80, which had been inserted in the insolvent's schedule :—*Held*, that the insolvent was not entitled to be discharged out of custody, having been taken in execution in an action by A. upon the bond, in which he had suffered judgment to go by default. *Denne v. Knott*, 143

INSURANCE.

On Life.

Nonpayment of Premiums.

Upon a policy of assurance on the life of A., the premium became due on the 15th of March, but was not paid until the 12th of April, when the country agent of the Insurance Company, through whom the insurance had been effected, gave a receipt for the amount of the premium. The instructions given by the Company to the agent were, that the premium on every life policy must be received within fifteen days from the time of its becoming due; if not paid within that time, that he was to give immediate notice

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to the office of that fact, and in the event of his omitting to do so, that his account would be debited for the amount, after the fifteen days had expired. No notice was given to the Company of the non-payment of the premium within the fifteen days; it was therefore entered in their books as paid on the 15th of March, and the agent was debited for the amount :—*Held*, first, that the mere debiting the agent with the premium could not be considered as a payment to the Company by the assured; secondly, that as the agent had no authority to contract for the Company, the fact of his receiving the money after the expiration of the fifteen days, and the entry in the Company's books, debiting him with the amount, were no evidence of a new agreement between the Company and the assured. *Accey v. Fernie*, 151

INTERPLEADER ACT.

The defendant having bought a rick of hay from the plaintiff, (who was the executor de son tort of M. S.), before payment of the price, received a notice from a third party, stating that he was the administrator of M. S., and demanding payment of the sum for which it had been sold. The defendant being subsequently sued by the plaintiff for the price of the hay :—*Held*, that he was not entitled to relief under the Interpleader Act, 1 & 2 Will 4, c. 58, s. 1. *James v. Pritchard*, 216

JOINT STOCK BANKING COMPANY.

(1). *Declaration by Manager.*

In an action brought by the public officer of a joint-stock banking copartnership, established under the 7 Geo. 4, c. 46, it is sufficient to state in the declaration, that the plaintiff is the manager of a certain joint-stock copartnership established for the purpose of banking, and that he has been duly

named and appointed as the nominal plaintiff on behalf of the copartnership, under the provisions of the statute, without stating expressly that he has been named as manager, or that the copartnership has been established under the provisions of the act. *Christie v. Peart*, 491

(2). *Execution against.*

Where a plaintiff obtains judgment against the public officer of a joint-stock banking copartnership, pursuant to stat. 7 Geo. 4, c. 46, s. 9, he may issue execution against the defendant without first suing out a scire facias. *Harwood v. Law*, 203

JURY.

Affidavits of Jurors, when receivable.

Affidavits of jurors as to what took place in open court on the delivery of their verdict, are receivable. *Roberts v. Hughes*, 399

LANDLORD AND TENANT.

See DISTRESS.

LIMITATION ACT, (1), (2).

(1). *Notice to Quit.*

A tenant held a house and land from year to year, the land from the 2nd of February, the house, &c., from the 1st of May. On the 16th of February, 1838, a notice to quit was served on him, requiring him to quit and deliver up the farm at the end of his *present* year's holding:—*Held*, that this was a good notice to determine the tenancy in the spring of 1839; it not being shewn on the part of the tenant that the land was not the principal subject of the holding.

A notice to quit, given by a person authorized by one of several lessors, joint-tenants, determines the tenancy as to all. *Doe d. Kindersley v. Hughes*, 139

(2). *Tenant's Right to remove Fixtures.*

The right of a tenant to remove te-

nant's fixtures continues only during his original term, and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant.

Where, therefore, the term pursuant to a proviso in the lease, was forfeited by the bankruptcy of the lessee, and the lessor entered upon the assignees, in order to enforce the forfeiture, and three weeks afterwards the assignees of the lessee, still continuing in possession, removed and sold a fixture put up by the lessee for the purposes of trade; and the jury found that it was not removed within a reasonable time after the entry of the lessor:—*Held*, that they had no right so to remove it, and that the lessor might recover it in trover.

And *semble*, such would have been the case even without such finding of the jury. *Weeton v. Woodcock*, 14

(3). *Action for double Value.*

Where the plaintiff, being the owner of a woollen mill and steam-engine, let to the defendant a room in the mill, together with a supply of power from the steam-engine by means of a revolving shaft in the room:—*Held*, in an action for double value, under stat. 4 Geo. 2, c. 28, against the tenant for holding over after the expiration of a notice to quit, that in estimating such double value, the value of the power supplied could not be included. *Robinson v. Learoyd*, 48

LARCENY

By Finder of Goods.

A person purchased, at a public auction, a bureau in which he afterwards discovered, in a secret drawer, a purse containing money, which he appropriated to his own use. At the time of the sale no person knew that the bureau contained any thing whatever:—*Held*, that if the buyer had express

notice that the bureau alone, and not its contents, if any, was sold to him; or if he had no reason to believe that any thing more than the bureau itself was sold, the abstraction of the money was a felonious taking, and he was guilty of larceny in appropriating it to his own use. But that if he had reasonable ground for believing that he bought the bureau with its contents, if any, he had a colourable right to the property, and it was no larceny. *Merry v. Green*, 623

LEGACY DUTY.

A., a British subject, domiciled in England, made his will and died in England, and by his will disposed of certain government notes of the East India Company, issued at Calcutta, and the amount of which was receivable only under an Indian probate; and appointed an English executor. The executor executed a power of attorney to S. in India, who thereupon obtained letters of administration with the will annexed in India, under which he received the amount of the notes, and remitted to the executor in England, who paid it over to the legatees:—*Held*, that legacy duty was payable thereon. *In the matter of Philip Coales*, 390

LIEN.

See SHIP.

LIMITATION ACT.

(1). *Lessor, when barred against a Lessee.*

Where a lessor permits his lessee, during the continuance of the lease, to pay no rent for twenty years, the lessor is not therefore barred, by the stat. 3 & 4 Will. 4, c. 27, s. 2, from recovering the premises in ejectment. The case falls within the latter branch of the 3rd section, which, in the case of an estate or interest in *reversion*, provides that the right of action shall be deemed to have first accrued when it

became an estate or interest in possession. The lessor, therefore, may recover in ejectment at any time within twenty years after the determination of the lease. *Doe d. Davy v. Oxenham*, 131

(2). *When Ejectment barred against Tenant at Will.*

Where A., in 1817, let B. into possession of lands as tenant at will; and in 1827, A. entered upon the land without B.'s consent, and cut and carried away stone therefrom:—*Held*, that this entry amounted to a determination of the estate at will; and that B. thenceforth became tenant at sufferance, until, by agreement express or implied, a new tenancy was created between the parties: and therefore, that unless the fact of such new tenancy were found by the jury, an ejectment brought by A. in 1839, was too late, inasmuch as, by the stat. 3 & 4 Will. 4, c. 27, s. 7, his right of action *first* accrued at the expiration of one year after the commencement of the original tenancy at will, i. e. in the year 1818. *Doe d. Bennett v. Turner*, 226

LIMITATIONS, STATUTE OF.

See PLEADING, II. (1).

Proof of Part Payment.

A verbal acknowledgment by a debtor, within six years, of the part payment of the debt, is not sufficient to take the case out of the Statute of Limitations. *Maghee v. O'Neil*, 531

MINING COMPANY.

Authority of Mine Agent.

The resident agent, appointed by the directors of a mining company to manage the mine, has not an *implied* authority from the shareholders of the Company to borrow money upon their credit, in order to pay the arrears of wages due to the labourers in the mine, who have obtained warrants of

distress upon the materials belonging to the mine, for the satisfaction of such arrears:—nor in any other case of necessity, however pressing. *Haw-
tayne v. Bourne,* 595

MONEY HAD AND RECEIVED.

A. entered into partnership with B. & C., who had previously carried on the same trade together, and who shortly afterwards became bankrupt: and by an agreement, to which A., and the assignees of B. & C. were parties, it was agreed that A. should realise the assets and liquidate the debts of the firm; and that the official assignee of the bankrupts should be empowered by A. to collect the outstanding debts, and pay the amount to S. & Co., bankers, to the account of A., being allowed the usual per centage:—*Held*, that A. could not alone sue the official assignee, in an action of money had and received, for monies collected by him under this agreement, which remained in his hands, and of which he had rendered an account to A. *Lewis v. Ed-
wards,* 300

MUNICIPAL CORPORATION
ACT.

See Costs, (3).

NAVIGATION ACT.

The Navigation Act, 3 & 4 Will. 4, c. 54, does not prohibit the importation for home consumption (except in British vessels, &c.), of any goods the produce of Europe, excepting those specifically enumerated in the second section. *Thompson v. Irving,* 367

NEW TRIAL.

Where a new trial is obtained ex debito justitiæ, on one of several issues, the rule for a new trial re-opens the whole record. *Earl of Macclesfield
v. Bradley,* 570

OUTLAWRY.

Reversal of—Terms of.

Under a *capias utlagatum*, issued in February 1838 (in an action on foreign bills of exchange for upwards of £7000), goods of the defendants, who were merchants carrying on business in the United States, were seized and sold; out of the proceeds of which the plaintiffs received upwards of £4000. On application to reverse the outlawry, the Court directed that it should be reversed on payment of all costs, and on entering a common appearance, and that the money received under the levy should be invested in Exchequer bills, and deposited with the officer of the Court, to abide the event of the suit.

Where, on an application to reverse an outlawry, the Court see sufficient grounds for believing that the defendant does not intend to remain in this country, and that the circumstances are such as that a judge would order a *capias* to issue under the 1 & 2 Vict. c. 110, s. 3, it seems that they will still impose on the defendant the condition of putting in special bail. *The Governor and Company of the Bank of
England v. Reid,* 159

PARTNERSHIP.

See MONEY HAD AND RECEIVED.

PAUPER.

Admission to sue—Costs.

After a plea of payment of money into Court, in an action of *assumpsit*, the plaintiff obtained an order to sue in formâ pauperis. A judge thereupon made an order that the money should remain in Court to abide the event of the cause, unless the plaintiff would take it out in full satisfaction. The defendants having obtained the verdict, the Court ordered that the money

should be paid out to them in satisfaction of their costs, antecedent to the order to sue in formâ pauperis.

Semble, a plaintiff may be admitted to sue in formâ pauperis after the commencement of the suit.

The action of assumpsit is within the operation of the stat. 23 Hen. 8, c. 15, s. 2. *Casey v. Tomlin*, 189

PILOT ACT.

Where a person selects the course of a ship, and takes the management of her for the purpose of directing her in that course, he is in the charge or conduct of the vessel, within the meaning of the 6 Geo. 4, c. 125, s. 70. The master of a ship is not, however, precluded by that section from employing any moving power, as, for instance, steam or other power *bonâ fide* used as a moving power, if upon the party applying such power necessarily devolves the selection of the ship's course, and the charge or conduct of her in that course.

The penalty imposed by the 70th section of the Pilot Act may be sued for by a common informer, and is within the second head of the 76th section. The consent of the Trinity House or Lord Warden is necessary only in the case of pilots licensed by them; but their consent is not required with reference to pilots not within their jurisdiction. *Beilby v. Scott*, 93

PLEADING.

See BILLS AND NOTES, (4), 1, 2.
RAILWAY ACT, (1), (2).
RAILWAY SHARES.
USURY.

I. Declaration.

(1). Several Counts.

The first count of a declaration was framed upon an agreement whereby the plaintiff agreed to let, and the defendant agreed to take, certain premises,

subject to conditions therein specified, and whereby it was agreed that the defendant should keep the windows and all other parts of the premises, except the roof and main timbers, and the outside, in effectual repair: and alleged as a breach, that he permitted them to be out of repair. The second count stated, that in consideration that the defendant had become and was tenant to the plaintiff of a *certain other* messuage and premises, the defendant promised to use them in a tenant-like and proper manner: and alleged as a breach, that he did not use the said last-mentioned premises in a tenant-like and proper manner, but made holes in the walls, damaged the doors, &c. At the trial, one contract of demise only, applying to one house only, was proved:—*Held*, that the plaintiff could not recover damages in respect of the breaches alleged in *both* counts, inasmuch as they must be taken to have reference to different messuages. *Holford v. Dunnell*, 348

(2). Ambiguity.

A declaration in debt stated, that the defendant was indebted to the plaintiff "for goods sold and delivered to the defendant by the plaintiff at *his* request." The defendant having demurred specially to this declaration, on the ground of its being ambiguous, the Court set the demurrer aside as frivolous. *Deriemer v. Fenna*, 439

II. Pleas in Bar.

(1). Conclusion with Verification.

A plea merely in the negative need not conclude with a verification.

To an action of assumpsit for work and labour as an attorney, the defendant pleaded non assumpsit *infra* sex annos, and concluded with a prayer of judgment, omitting the verification:—*Held*, on special demurrer, that the plea was good. *Bodenham v. Hill*, 274

(2). *Several Pleas.*

The stat. 4 & 5 Anne, c. 16, s. 4, does not extend to the case of the Crown, and therefore the Court has no authority to give a defendant leave to plead several matters, in an information of intrusion filed by the Attorney-General. *Attorney-General v. Donaldson*, 422

(3). *Issuable Pleas.*

To an action by the indorsee against the acceptor of a bill of exchange, a plea that the drawer had been twice bankrupt, and that his estate had not paid 15*s.* in the pound under the second fiat, whereby the property in the bill vested in the assignee under the second fiat, and the drawer could make no title by indorsement, is an issuable plea. *Mackay v. Wood*, 420

(4). *Liberum Tenementum, Effect of.*

A plea of liberum tenementum, to an action of trespass qu. cl. fr., is not supported by proof of the exercise of acts of ownership by the defendant for a period of less than twenty years, where it appears that before the commencement of that period, and also within twenty years, the estate was in a third person. *Brest v. Lever*, 593

(5). *Release.*

A declaration on a policy of insurance on goods on board a ship, at the suit of D. W. & A. W., alleged that the policy was made by them as well in their own name as for and in the name of every other person to whom the same did appertain; and it averred that one T. Z. and the plaintiff A. W., or one of them, were or was then, and from thenceforth until the loss, interested in the goods. To this declaration the defendant pleaded a release by D. W. for himself and his partner A. W. The plaintiffs replied, setting out on oyer the deed of release, by the recital in which it appeared that the intention of the

parties was to release only the sums set opposite their respective names in the schedule thereto annexed; and the declaration averred, that the money so released was due upon other and different contracts than those mentioned in the declaration:—*Semble*, that the replication was bad, as amounting to an argumentative denial of the release mentioned in the plea.

Held, also, that the plea was a good answer to the action. *Wilkinson v. Lindo*, 81

(6). *Exoneration by Plaintiff from Promise.*

To a declaration in assumpsit founded on mutual promises to marry within a reasonable time, it is a good plea, that after the promise, and before any breach thereof, the plaintiff absolved, exonerated, and discharged the defendant from his promise, and the performance thereof. *King v. Gillett*, 55

(7). *Tender after Breach.*

Assumpsit on a special agreement, whereby, in consideration of the sale to the defendant of a portrait, and the exclusive copyright of engraving the same for publication, the defendant promised to pay £150, and to deliver to the plaintiff fifty proof impressions of the engraving when made therefrom. The declaration averred that the engraving was made, and that the money was paid, and alleged as a breach, that, although a reasonable time had elapsed for the delivery of the fifty proof impressions, and although the defendant was required to do so, yet the defendant had not delivered them or any part of them, and had neglected and refused so to do. Plea, that, after the making of the promise in the declaration mentioned, and after the making of the said engraving, the defendant delivered to the plaintiff ten proof impressions thereof in part performance of his said promise, and the plaintiff accepted the same in

satisfaction and discharge of the promise as to ten of the fifty impressions; that he then was ready and willing, and then tendered and offered to the plaintiff to deliver to him forty other impressions of the said engraving, which the plaintiff then refused to accept or receive, and then requested the defendant to let him have the choice of forty of all the impressions that were printed, to which request the defendant then acceded, and the plaintiff then promised the defendant to make his selection of the said forty proof impressions out of all the impressions that were then printed: that the defendant had always been ready and willing to let the plaintiff choose the said forty out of all the impressions then printed, but that the plaintiff had never made any selection of the same, but had always thence hitherto neglected to do so; *absque hoc* that the defendant refused and neglected to deliver to the plaintiff the said fifty proof impressions, as in the declaration in that behalf alleged:—*Held*, that the plea was bad after verdict. *Negelen v. Mitchell*,

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(8). *Other Cases.*

1. Debt on bond by the treasurer appointed by Commissioners acting under a local Lighting and Paving Act, against a collector of rates and his sureties. The defendants cravedoyer of the bond and condition, which recited, *inter alia*, that H. J., one of the defendants, had been appointed collector of the rates due and payable under and by virtue of the act, and had been called upon to give security for the due performance of the office; and the condition was, *inter alia*, for the collection of all such rates as H. J. should be directed to demand and obtain by virtue of his said office, and for delivering a true account of and paying to the treasurer of the Commissioners, all monies by him received “by virtue and

for the purposes of the said act.” The defendants then pleaded, so far as related to that part of the condition, that “during the continuance of the said appointment *no rate was made or in any way existed which he, the said H. J., could legally or according to law collect or get in, or could legally or according to law demand or obtain by virtue of his said office*, and that he did not at any time during the continuance of his said appointment, legally receive any money by virtue or for the purposes of the said act or relative to the collectorship of the said rates:”—

Held, 1st., that the plea would have been bad on special demurrer, if the objection had been sufficiently pointed out, for attempting to raise an issue of law, and for not shewing positively, either that no rate was made, or in what the alleged illegality consisted.

2ndly, that the first part of the plea, which stated “that no rate was made, or in any way existed which he, the said H. J., could legally or according to law collect or get in,” &c., not being specially demurred to, was a substantial defence to the action, as shewing a sufficient excuse for non performance of the condition; and that the rest of the plea might be rejected as surplusage. *Webb v. James*, 279

2. Declaration in assumpsit stated, that the plaintiff put up certain leasehold premises to auction, subject to conditions that the purchaser should complete the purchase by a certain day, and that the plaintiff should deduce a good title to the premises, commencing with the lease under which they were then held: and assigned as a breach, that although the plaintiff did deduce a good title commencing with the lease, the defendant did not complete the purchase according to the contract.

The defendant pleaded, that the premises were, on &c., demised by T. L. to W. B. for a term still subsisting, subject to a covenant by W. B. to keep

the premises in repair, and for re-entry by T. L. in default thereof: that the interest of W. B. vested by assignment in the plaintiff, and that the plaintiff, after the assignment, suffered the premises to be out of repair, and that they continued so up to the time of sale, so that the term might, at the option of T. L., be determined; and that the plaintiff, by reason of the premises, had not, at the time of the sale or afterwards, any valid title to the premises. The defendant pleaded also, that the plaintiff had not, at the time of the sale or at any time afterwards, any good and valid title to the premises, and did not deduce or make a good title to the defendant.

On special demurrer to these pleas, the former was held bad, as being an argumentative denial of the allegation in the declaration, that the plaintiff made a good title; and the latter, on the ground that, if the defendant meant to object to the validity of the lease, he ought to have confessed the allegation of title in the declaration as it stood, and then to have pointed the plea specifically to the objection that the lessor had no title. *Wheeler v. Wright*, 359

(8). Other Cases.

3. The declaration stated, that the defendant caused to be put up to sale by auction certain premises, for the residue of a term of years, on the condition, amongst others, that the defendant should deduce and make a good title thereto, commencing with the lease of the premises under which they were then held; and assigned as a breach, that the defendant did not deduce a good title commencing with the lease.

Plea, that the premises so put up to sale were premises of which the defendant was possessed under a mortgage from the plaintiff for the residue of the term, and that they were put up

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to sale under a power of sale in the mortgage: that before and at the time of the mortgage, the plaintiff held the premises under a lease from T. L., subject to a covenant by the plaintiff for repair, and a proviso for re-entry, or the cesser of the term, at the option of T. L., on breach of such covenant: that the plaintiff, before and at the time of the sale, had full knowledge of all the premises: that the defendant did deduce a good title to the premises, commencing with the lease, in all respects except this, that the premises were out of repair, of which the plaintiff had full knowledge: that they were, at the time of the sale, in as good repair as at the time of the mortgage; and that T. L. had not re-entered or claimed to re-enter, or in any way avoided the lease:—*Held*, bad on general demurrer. *Barnett v. Wheeler*, 364

(See also, post, III, (1), 1; (2), (5).

III. Replication.

(1). *De Injuria*.

1. *Indebitatus assumpsit* for work and labour, and for services in navigating certain barges for the defendants. Plea, that the claim was for wages due for services performed by the plaintiff as master of a boat used by the defendants for the carriage of goods, they being common carriers, and that the plaintiff was hired by them under an agreement, that, as master of the said boat, he was to be responsible for the safety and due delivery of all goods taken on board by him, and was to be chargeable for all pilferages of, or damage or losses to any goods under his charge; and that the amount thereof should be deducted from his wages, and might be pleaded or set off accordingly. The plea then averred the delivery of a pipe of wine to the plaintiff on board the boat; and that, whilst it was so in the plaintiff's charge, the wine was pilfered and water substituted in lieu

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thereof, whereby the pipe of wine was greatly damaged, for which damage the defendants were liable, and which damage amounted to a certain sum, &c., which far exceeded the amount of the causes of action in the declaration mentioned. The defendants then claimed to set off the loss they had thereby sustained, against the plaintiff's demand. To this plea the plaintiff replied *de injuriâ*:—*Held*, that the replication was improper.

Semble, that the plea amounted to the general issue. *Cleworth v. Pickford*, 314

2. To an action by indorsee against acceptor of a bill of exchange, the defendant pleaded that it was accepted for a gaming debt, and that the plaintiff, before the indorsement to him, had notice thereof:—Replication, *de injuriâ*;—*Held*, good on special demurrer. *Humphreys v. O'Connell*, 370

(2). To Plea of Tender.

Assumpsit by payee against maker of a promissory note for 15*l.* 9*s.* 4*d.*, payable on demand; averring a demand on a particular day. Plea, as to £3, parcel, a set-off due at the time when the note was demanded, and ever since; concluding with a verification and prayer of judgment: and as to 12*l.* 9*s.* 4*d.*, residue, that at the time of the demand the defendant tendered the plaintiff 12*l.* 9*s.* 4*d.*, and hath always, from the time of making his said promise, as to 12*l.* 9*s.* 4*d.*, been ready and willing to pay that sum, and now brings the same into Court, &c.; concluding with a verification and prayer of judgment. Replication to the first plea, a traverse that any set-off was due at the commencement of the suit, on which issue was joined; to the second, that, before the making of the alleged tender, and before and at the time of the making of the demand and refusal hereinafter mentioned, a larger sum than 12*l.* 9*s.* 4*d.*, to wit, 15*l.* 9*s.* 4*d.*, including the

said sum of 12*l.* 9*s.* 4*d.*, was due upon the note; and that before the said tender, the plaintiff demanded payment of the said sum of 15*l.* 9*s.* 4*d.*, which so included the 12*l.* 9*s.* 4*d.*, but the defendant refused to pay the 15*l.* 9*s.* 4*d.*; and that at the time of such demand and refusal, no set-off or other just cause for non-payment thereof existed:—*Held*, on special demurrer, that the replication was good. *Cotton v. Godwin*, 147

(3). Traverse of immaterial Allegation.

Plea, to an action of covenant for rent due for turnpike tolls, that before it became due, the trustees, on &c., entered into and upon a certain part of the tolls, and then ejected, expelled, put out, and removed the defendant from the possession thereof, and kept and continued him so ejected, &c. from thence hitherto. Replication, that the trustees did not enter into or upon the said part of the tolls, or eject, &c. the defendant from the possession thereof, modo et formâ:—*Held* bad on special demurrer, as putting in issue not only the expulsion, which was the only material allegation of the plea, but also the entry, which was immaterial. *Palmer v. Gooden*, 486

(4). Duplicity.

Assumpsit by the indorsee against the acceptor of a bill of exchange, drawn by D. upon the defendant. Plea, that the defendant, by D., his agent duly authorized in that behalf, paid to the plaintiff, and the plaintiff then accepted and received of D. as such agent, a certain sum in full satisfaction and discharge of the causes of action. Replication, that the defendant, by D. his agent, did not pay to the plaintiff, nor the plaintiff accept or receive of D., as such agent, the said sum in full satisfaction and discharge of the promises in the plea mentioned:—*Held*, on spe-

cial demurrer, that the replication was good. *Bennison v. Thelwell*, 512

(5). *New Assignment.*

Declaration in assumpsit by drawer against acceptor of a bill of exchange for 728*l.* 6*s.*, dated 15th of February, 1840, payable three months after date. Plea, as to 609*l.* 10*s.*, parcel of the monies in that count mentioned, that after the acceptance of the bill in that count mentioned, the defendant paid to the plaintiff the sum of £700 in full satisfaction and discharge of (inter alia) the sum of 609*l.* 10*s.*, parcel of certain monies mentioned and specified in a certain bill of exchange, bearing date 15th of February, 1840, and drawn by the plaintiff upon and accepted by the defendant, and that the plaintiff accepted and received the said sum of money in such full satisfaction and discharge: and that the bill of exchange in the count mentioned was and is the same identical bill as that in the plea mentioned, in respect whereof the said payment was so made, and not any other or different bill. Replication, that the bill in the count mentioned was not nor is the same identical bill as that in the plea mentioned, &c., &c.: concluding to the country:—*Held* bad on special demurrer. *Wheeler v. Senior*, 562

See also, ante, II. (4).

IV. *Repleader.*

Where there are several pleas on the record, if one of them traverse immaterial matter in the declaration, and the defendant has pleaded other material matters which have been disposed of on proper issues, the Court will not grant a repleader. *Negelen v. Mitchell*, 612

PRACTICE.

(1). *Entering Appearance for Defendant.*

Where the original writ of summons was sent by the plaintiff to the defend-

ant at his request, but he kept it, and did not appear, the Court refused to allow the plaintiff to enter an appearance for the defendant sec. stat., without indorsing on the writ the date of the service, pursuant to the rule of M. T. 3 Will. 4. *Atkison v. Howell*, 213

(2). *Service of Rule to compute.*

Service of a rule to compute principal and interest on a bill of exchange or promissory note, upon one of several defendants, is sufficient, as service upon one is service upon all, *Amlot v. Evans*, 462

(3). *Staying Proceedings.*

1. Where a Judge at Nisi Prius has granted a certificate for speedy execution, under the stat. 1 Will. 4, c. 7, s. 2, and final judgment has been signed accordingly, the Judge has no power afterwards to order a stay of proceedings. *Lander v. Gordon*, 218

2. Where a Judge's order for staying proceedings in an action brought against good faith, was made in Trinity Vacation, and a motion to set aside that order was not made until Michaelmas Term:—*Held*, that the mere lapse of time was not sufficient to preclude the application, no injury having accrued to the defendant thereby.

Every Court has an unlimited power over its own process, and may stay proceedings brought against good faith, though the agreement, in fraud of which the action was brought, was made whilst the parties were not under the authority of the Court. *Cocker v. Tempest*, 502

(4). *Setting aside Proceedings.*

Where application is made to set aside proceedings for irregularity after eight days, but within the eight days a similar application had been unsuccessfully made to a Judge at chambers, the Court cannot take notice of such

application at chambers, unless it be shewn on affidavit, even though the Judge, being in Court, certifies the fact. *Goren v. Tute*, 142

(5). *Judgment as in case of a Nonsuit.*

The affidavit, in answer to a rule for judgment as in case of a nonsuit, stated that the plaintiff, *after filing the declaration*, was given to understand that the defendant was insolvent, and therefore instructed his attorney not to proceed to trial:—*Held*, that this affidavit was not sufficient to compel the defendant to accede to a stet processus, but that he was entitled to a peremptory undertaking. *Mann v. Williamson*, 145

PREScription ACT.

The grant to a person, *his heirs and assigns*, of "free liberty, *with servants or otherwise*, to come into and upon lands, and there to hawk, hunt, fish, and fowl," is a grant of a *license of profit*, and not of a mere *personal license of pleasure*; and therefore it authorizes the grantee, his heirs and assigns, to hawk, hunt, &c., *by his servants* in his absence.

Such a liberty is, therefore, a profit à prendre, within the Prescription Act, 2 & 3 Will. 4, c. 71, s. 2. *Wickham v. Hawker*, 63

PRINCIPAL AND AGENT.

See MINING COMPANY.

Liability of Committee-men of Club.

A club was formed, by the regulations of which the members paid entrance-money and an annual subscription, and cash was paid for provisions supplied to the house. The funds of the club were deposited at a banker's, and a committee was appointed to manage the affairs of the club, and to administer the funds, but no member of the committee had authority to draw cheques, except three who were chosen for that purpose, and whose signatures

were countersigned by the secretary:—*Held*, in an action brought against two of the committee by a tradesman who had supplied wine on credit, ordered by a member of the committee for the use of the club, that the tradesman was not entitled to recover, without proving either that the defendants were privy to the contract, or that the dealing on credit was in furtherance of the common object and purposes of the club. *Todd v. Emly*, 427

PROCESS.

Distringas.

When it may issue.

A *distringas* may issue after the expiration of four months from the issuing of the writ of summons.

A writ of summons was issued on the 5th of July, but it did not appear whether any attempt was made to serve it or not. On the 5th of December, an alias writ of summons was sued out, and the plaintiff not being able to effect service of it, obtained a *distringas* as for a non-appearance to the original writ of summons:—*Held*, that the *distringas* was not irregular. *Pearce v. Swain*, 543

PROCHEIN AMY.

The wife of a minor having committed adultery whilst her husband was abroad in the East Indies, the father procured himself to be appointed prochein amy, and commenced an action for crim. con. in his son's name, without his knowledge or authority, and recovered a verdict. On motion to set aside the proceedings, on the ground of there being no authority from the son to bring the action:—*Held, first*, that as the defendant had reason to believe long before the trial, that the authority of the son could not have been obtained, he ought to have made inquiries then, and that the application was now too late. *Secondly*, that no

authority from the son was necessary to enable the father to sue as prochein amy; and there being nothing to shew that he was not properly appointed prochein amy, that it must be assumed to have been properly done, and that the son would be bound by the judgment in this action. *Morgan v. Thorne*,

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QUÆ EST EADEM.

See PLEADING, III. (5).

RAILWAY ACT.

(1). *Calls, when properly made—Pleadings.*

In an action by a Railway Company for calls, the declaration alleged that "the defendant *subscribed* for a large sum of money, to wit, £5000, towards the undertaking mentioned in the act," &c. The Company were empowered by the 3rd section of the act to raise a million of money for constructing and maintaining the railway; and by the 195th section it appeared that £660,000 had been subscribed for by several persons, under a contract binding themselves and their heirs, before the passing of the act. A motion having been made in arrest of judgment, on the ground that the declaration should have alleged a subscription by deed:—*Held*, that the declaration was good after verdict.

Semble, that it would have been also good on special demurrer.

By the 121st section, the directors were empowered to make calls, the aggregate amount not to exceed £100, and no call to exceed £10 upon each share, and an interval of three calendar months was to elapse between the days of payment of each call. It also required that twenty-one days' notice should be given of every call, by advertisement in certain newspapers, and enacted that all money so called for

should be paid to such persons, at such times and places, as in the said notice should be appointed. A resolution of the directors was made for a call of £8 per share; but the resolution, although it mentioned the period within which the call was to be paid, did not specify the place where, or person to whom, the payment was to be made. The notice of that call, inserted in the local newspapers, according to the directions of the act, specified the time and place of payment and the persons to whom the payment was to be made:—*Held*, first, that the publication of the notice must be assumed to be the act of the directors; secondly, that the call was properly made. *The Great North of England Railway Co. v. Biddulph*, 243

(2). *Calls, when properly made—Transfer of Shares, when valid.*

The Sheffield and Manchester Railway Act, (7 Will. 4, c. xxi), by s. 115, empowered the directors from time to time to make such calls from the proprietors, on their respective shares, as they from time to time should find necessary, so that no call should exceed £10 on each share, and that there should be an interval of three calendar months between each successive call, and twenty-one days' notice should be given of every such call by advertisement in the local newspapers; and the proprietors were thereby required to pay the calls on their shares to such person, at such time, at such place, and in such manner, as the directors should from time to time direct or appoint. The directors made a resolution for a call, specifying therein the amount of the call, and the day of payment, but not the place where, or the person to whom, the payment was to be made; but a notice of that call subsequently inserted in the local newspapers, according to the directions of the act, specified all those matters. In

an action for the amount of such call against a party who was a proprietor at the date of the resolution, of the notice, and of the day appointed for payment, it not appearing also that there was any change in the directory during that interval:—*Held*, that the call was properly made.

By another resolution, made on the 13th of March, the directors resolved that a call of £5 should be made on the 30th of March instant, to be paid on the 1st of May:—*Held*, that the call was not invalid because the resolution was prospective.

Some of the directors by whom the resolutions for the calls were made, were members of a banking company, who were the bankers and treasurers of the Railway Company, and as such received and gave receipts for calls, and paid cheques drawn by the directors, &c. A clause of the act of Parliament (sect. 150) enacted, that no person concerned or interested in any contract with the Company should be capable of being chosen a director, and that if any director should directly or indirectly be concerned in any contract with the Company, he should thereon be immediately, and was thereby discharged from the direction:—*Held*, that this clause applied only to contracts made with the Company in prosecution of its enterprise, and did not disqualify the directors above mentioned.

Another clause (sect. 159) directed that the orders and proceedings of the directors should be entered in a book, and signed by the chairman of the meeting, and enacted, that when so entered and signed, they should be deemed originals, and be read in evidence without proof of the persons making or entering them being directors, or of the signature of the chairman:—*Held*, that a book of proceedings, purporting to be signed "W. S., deputy chairman," was evidence *per se*, without proof that W. S. was in

fact deputy chairman, or as such presided at the meeting.

A transfer of railway shares from an original subscriber to the undertaking, made before the formation of a register of proprietors pursuant to the act, but after the passing of the act of Parliament, is good, although the transferee be never registered as a proprietor.

Where the act required such transfer to be by deed, and a transfer of shares was executed by the seller with a blank for the purchaser's name, and stating the consideration untruly, but the purchaser afterwards signed and transmitted to the Company, in pursuance of the act, a proxy paper describing him as the proprietor of the shares:—*Held*, in an action by the Company against him for calls on such shares, that he was precluded from disputing the validity of the transfer. *The Sheffield, Ashton-under-Lyne, and Manchester Railway Co. v. Woodcock*

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RAILWAY SHARES,

Transfer of — Implied Undertaking against subsequent Calls—Pleading.

On the 20th of February, 1838, the plaintiff entered into a contract with the defendant, through their respective brokers, for the sale of thirty shares in the Bristol and Exeter Railway, at 7*l.* 5*s.* per share, and the usual contract notes passed between the parties, no time being mentioned for the completion of the purchase. On the 3rd of March, the defendant wrote to the plaintiff's brokers, requesting them to "dispatch the thirty Bristol and Exeter shares forthwith," and they replied the same day, "we herewith send you the transfer of thirty Bristol and Exeter shares in *blank*." This was accordingly done, and the purchase-money was paid. Calls were subsequently made on these shares, and they not being registered in the name of the defendant, the plaintiff

RESERVATION.

remaining the apparent owner of them, he was compelled to pay the calls. In an action against the defendant for not indemnifying the plaintiff for the payments and liabilities in respect of the calls:—*Held*, that under the above circumstances, there was no undertaking implied by law to indemnify against all subsequent calls, nor any evidence of such an undertaking in point of fact.

The declaration, after setting forth the contract, contained an averment that the plaintiff had “always from the time of the sale of the said shares, and the making of the said promise hitherto, been *ready and willing to transfer* the said shares to the defendant, according to the terms of the said contract.” This was traversed by plea:—*Held*, that there was sufficient evidence in the case of such readiness; but that if it had been necessary in order to support the allegation, to prove the tender of a valid conveyance, it would not have been sufficient. *Humble v. Langston*, 517

REGISTRY ACT.

See SHIP.

RELEASE.

See COMPOSITION DEED.

RESERVATION.

Of Right of sporting.

By a deed, A. and B. conveyed to D. and his heirs certain lands, *excepting and reserving* to A. B. & C., their heirs and assigns, liberty to come into and upon the lands, and there to hawk, hunt, fish, and fowl:—*Held*, that this was not in law a *reservation* properly so called, but a *new grant* by D. (who executed the deed), of the liberty therein mentioned: and therefore that it might enure in favour of C. and his heirs, although he was not a party to the deed. *Wickham v. Hawker*, 63

SHERIFF.

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SHERIFF.

(1). *Poundage.*

A writ of ca. sa. was indorsed by mistake for a larger sum than the amount really due, and after the debtor had been taken in execution, the mistake was corrected by a Judge's order:—*Held*, that the sheriff's claim for poundage must be regulated accordingly, and that he was only entitled to poundage upon the debt really due. *Evans v. Manero*, 463

(2). *Fees of.*

A sheriff, on making a levy under an execution, is only entitled to his poundage under 29 Eliz. c. 4, and to such fees as are allowed by the table of fees framed under 7 Will. 4 & 1 Vict. c. 55; and although he be put to extra trouble and expense in making the levy, he cannot claim more. *Slater v. Hame*, 413

(3). *Action against for Extortion—Tender of Excess—Evidence.*

The sheriff seized goods in the possession of S., to satisfy a fi. fa. issued against him upon a judgment of nonsuit for £67. S. had previously conveyed all his estate and effects to H. by a deed which it was contended was fraudulent and void against creditors: and H. gave notice to the sheriff's officer not to sell, and demanded the goods. The officer refused to deliver them except on payment of £97, (the additional £30 being claimed for poundage, expenses, &c.) which the person sent by H. to demand the goods paid under protest. The sheriff, being ruled to return the writ, returned that he had levied of the goods and chattels of the plaintiff S. the sum of £67. In an action for money had and received, brought by S. against the sheriff to recover back the £30:—*Held*, that it was not necessary to prove a tender of the £67.

Held, also, that a letter from the

under-sheriff to the officer in possession, directing him to demand only the £67, if S. came to pay the amount of the execution, was not admissible in evidence on behalf of the defendants.

Held, however, that it was a question for the jury, and ought to have been left to them, whether the money paid to redeem the goods was the money of S. or not, and that if it was not, he was not entitled to recover: and that the sheriff was not estopped by his return to say that the excess beyond the £67 was not the money of S. *Scarfe v. Hallifax*, 288

SHIP.

(1). *Authority of Master—Charter-party.*

Where A. the charterer of a vessel, by the charterparty, agreed that on the arrival of the ship at the outward port, he would, through his agent there, supply cash to the master for the disbursements of the vessel, to be repaid by bills to be drawn by the master on the owner: and, on the arrival of the vessel there, the agent supplied goods for the use of the crew, and paid certain money demands made on the master, but did not advance any actual cash:—*Held*, that although it was not shewn that any bills were drawn by the master for the amount, A. might recover it from the owner in an action for goods sold and delivered and for money paid, the master having authority to obtain supplies of goods and money for the necessary use of the ship on the credit of the owner, independently of the express stipulation of the charterparty. *Weston v. Wright*, 396

(2). *Authority of Master to sell Ship—Ratification by Owner—Registry Act.*

Semble, that the master of a ship has authority, when, in consequence of injury to the ship during the voyage, there is no prospect of bringing her to

the termination of the voyage, to sell her for the benefit of all parties interested.

At all events, where the proceeds of such sale have been received by the owner, that is a sufficient ratification by him of the act of the master in selling her, so as to prevent him from afterwards recovering back the ship from the purchaser or one claiming under him.

So, it is equally a ratification of a sale by an auctioneer, acting under a parol authority from the master.

And where, under such circumstances, the ship was transferred by an instrument executed by the auctioneer, *under seal*, but in other respects complying with the requisitions of the Registry Act, 3 & 4 Will. 4, c. 55, s. 31, it was held, that the ratification of the owner was sufficient to give validity to the transfer; for that, as the statute does not require a transfer *under seal*, the instrument might have the effect of a written transfer by the master according to the statute, as well as that of the deed of the auctioneer.

The purchaser of a vessel under such circumstances cannot set up any defence of *lien* against an action of trover by the owner. *Hunter v. Parker*, 322

SLANDER.

(1). *Words actionable per se.*

A declaration for the following words, alleged to have been spoken by the defendant's wife, of the plaintiff:—"You *robbed me*, for I found the thing you have done it with:”—*Held*, that the words were actionable *per se*, without any colloquium or innuendo to explain the sense in which they were used. *Rowcliffe v. Edmonds*, 12

(2). *Imputation of Insolvency.*

Slander for speaking of the plaintiff the following words:—"I will bet £5 to £1 that Mr. J. (the plaintiff)

was in a sponging-house for debt within the last fortnight, and I can produce the man who locked him up; the man told me so himself." And in answer to the following question from a bystander, "Do you mean to say, that Mr. J., brewer, of Rosehill, has been to a sponging-house within this last fortnight for debt?" the defendant said, "Yes, I do." The jury found that the words were spoken of the plaintiff in the way of his trade:—*Held*, that the action was maintainable, and that the verdict was right, as it was plain from the conversation that the words were spoken of the plaintiff in his character of a brewer.

Semble, also, that the words were actionable independently of that, because they must necessarily affect the plaintiff in his trade and credit. *Jones v. Littler*, 423

STAMP.

(1.) *On Agreement.*

An agreement for the sale of a house stated that the sale was subject to the covenants set forth "in a draft lease delivered this day:"—*Held*, that in calculating the number of words with reference to the stamp upon the agreement, the covenants in the lease were not to be included; and, the agreement containing less than 1080 words, and being stamped with a £1 stamp, that the stamp was sufficient. *Sneezum v. Marshall*, 417

(2.) *On Bond.*

A bond conditioned to secure a principal sum, with interest at £5 per cent. commencing from a previous day, is only liable to stamp duty on the principal sum. *Barker v. Smark*, 590

STOCK-JOBGING ACT.

Indebitatus assumpsit for stock sold and caused to be transferred by the plaintiff to the defendant, and by the
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defendant duly accepted. Plea, that the stock alleged to be caused to be transferred was so caused to be transferred by virtue of an agreement with the plaintiff for the transfer of the same in consideration of 4531*l.* 5*s.*, to be therefore paid to the plaintiff for the same; and that at the time of the making of such agreement the plaintiff *was not actually possessed of or entitled to the stock* in his own right &c., by means whereof the said contract became and was null and void:—*Held*, that the plea was no answer to the action, and that the contract was not within the 7 Geo. 2, c. 8, s. 8. *Mortimer v. McCallan*, 20

TRESPASS.

See PLEADING, II. (7).

TROVER.

See EXECUTOR AND ADMINISTRATOR.

TURNPIKE ACT.

Construction of.

The words "inclosed lands," in the 97th and 98th sections of the Turnpike Act, 3 Geo. 4, c. 126, mean lands which are actually inclosed and surrounded with fences; and therefore where lands situate on the Downs were not fenced off, although private property:—*Held*, that a surveyor appointed by the commissioners might take materials for the repair of a turnpike road, without the order of justices mentioned in the 98th section, such lands not being within the meaning of the words "inclosed lands," contained in that section. But it is otherwise where the land is surrounded by a fence, though it be out of repair. *Tapsell v. Crosskey*, 441

USE AND OCCUPATION.

A. let premises to four persons, B., C., D., and E., for a year certain, ending at Midsummer, 1839, with a pro-

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viso that if, a month at least before the termination of the year, a request were to him to that effect, A. would grant them a lease for seven, fourteen, or twenty-one years. The lessees were directors of a joint stock bank, and occupied the premises for the purpose of its business. B. ceased to be a director in January, and C. in March, 1839. On the 31st of May, the solicitor of the directors applied to A. to renew the tenancy for another year to the then directors; but no agreement to that effect was finally executed. On the 20th of June, the solicitor applied for a renewal of the agreement for a quarter of a year; to which the plaintiff, on the 23rd, replied "that he should consider of it." Nothing further passed between the parties, but at the Michaelmas following the premises were delivered up to A.:—*Held*, that the four original lessees were liable to A., in an action for use and occupation, for the rent of the quarter from Midsummer to Michaelmas. *Christy v. Tancred*, 127

USURY.

In trover by the assignees of a bankrupt, the defendant pleaded, that, before the bankruptcy, he advanced the bankrupt a sum of money upon the deposit of the goods in respect of which the action was brought. Replication, that it was corruptly, and *against the form of the statutes*, &c. agreed between the defendant and the bankrupt, that the latter should pay the defendant for the loan of the money £10 per cent.:—*Held*, on special demurrer, that the averment of the contract being against the form of the statute was not a sufficient allegation that it was illegal; and that the replication was bad, for not alleging either that the contract was made before the 7 Will. 4 & 1 Vict. c. 80, and 2 & 3 Vict. c. 37, came into operation, or that it was excepted from the provisions of those acts. *Turquand v. Mosdon*, 504

VENDOR AND PURCHASER.

See PLEADING, II. (7), 2, 3.

Action for not completing Purchase—Damages.

Where a party has been let into possession of lands under a contract of purchase, but does not complete the purchase, and refuses to pay the purchase-money, and no conveyance is executed, the vendors cannot recover from him the whole amount of the purchase-money, but only the damages actually sustained by his breach of contract.

In assumpsit by the vendor against the purchasers of land, the declaration stated, that in consideration of the plaintiff's selling to the defendants certain land, *to be paid for as soon as the conveyance should be completed*, the defendants promised to purchase and pay for the same. Averment, that although the plaintiff had allowed the defendants to enter into possession of the lands, and had always been ready and willing to make a good title, and *offered* the defendants to execute a conveyance, and *would have tendered a proper conveyance, but that the defendants discharged him from so doing*; yet the defendants did not regard their said promise, and *did not pay the plaintiff the purchase-money*, or any part thereof. Plea, that no conveyance had ever been made or executed to the defendants:—*Held*, on general demurrer, that the plea was bad, and the declaration good.

Quære, whether the declaration would have been sufficient on special demurrer? *Laird v. Pim*, 474

VENUE.

Undertaking to give Material Evidence.

An undertaking to give material evidence of some matter in issue arising in a particular county, is satisfied by

evidence arising in that county, which bears on the amount of damages.

In an action for breach of warranty of a horse, in which the issue raised on the pleadings was, whether the plaintiff bought the horse of the defendant or not, payment in Middlesex of the keep of the horse, after notice to the defendant of its unsoundness, was held sufficient to satisfy the undertaking to give material evidence in that county.

Quære, whether a letter of the plaintiff's attorney to the defendant, written in Middlesex, but posted in London, giving notice of the unsoundness, and requiring the defendant to take back the horse, otherwise it would be sold by a certain day, (verbal notice to the same effect having been previously given to him), was sufficient to satisfy such undertaking? *Greenway v. Titchmarsh*,
221

WITNESS.

(1). *Competency of Devisee.*

In an action of debt against a devisee on a bond of his testator, in which the question is whether the signature of the testator is a forgery or not, a party entitled, under the testator's will, to an annuity charged on his real estate, is not a competent witness for the defendant. *Bloor v. Davies*,
235

(2). *Examination of Witnesses Abroad.*

In an action at the suit of the Crown, the Court has no power, under the 1 Will. 4, c. 22, at the defendant's instance, to direct a commission for the examination of witnesses. *Regina v. Wood*,
571

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